86-102

No. _____

Supreme Court, U.S.
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In the

# Supreme Court of the United States

October Term, 1986

MARK LEWIS SINGER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Petitioner's first conviction was reversed for judicial misconduct. Before the second trial, the U.S. Attorney revealed it had acquired and read a confidential file stolen from the Petitioner's attorney. The U.S. Attorney, his assistants, the Chief Federal District Judge, the Police Chief, and a DEA agent publicly, and falsely, claimed the file showed that the attorney had suborned perjury in the trial. Privately, before the accusations were made, both the U.S. Attorney and F.B.I. concluded that the stolen file did not support this claim and so informed the Chief Judge. Because of these accusations, the Petitioner's privately retained counsel of choice withdrew from the second trial. The questions presented are:

I.

WHEN THE GOVERNMENT WRONGFULLY INTERFERES WITH A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHTS, THEREBY DEPRIVING HIM OF LONG-STANDING, PRIVATELY RETAINED COUNSEL OF CHOICE AND FORCING ACCEPTANCE OF APPOINTED COUNSEL, IS PREJUDICE PRESUMED OR IS THE ERROR HARMLESS ABSENT A SHOWING THAT THE REPLACEMENT COUNSEL WAS INEFFECTIVE?

II.

DOES THE DOUBLE JEOPARDY CLAUSE BAR RETRIAL OF A DEFENDANT AFTER HIS CONVICTION IS REVERSED FOR JUDICIAL MISCONDUCT, AND EVIDENCE SHOWS THE MISCONDUCT WAS MOTIVATED BY A DESIRE TO SECURE THE DEFENDANT'S CONVICTION?

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On Petition for a Writ of Certiorari
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Appeals for the Eighth Circuit

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The petitioner, Mark Lewis Singer, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 26, 1986.

## REPORTS OF OPINIONS BELOW

The most recent opinion of the Eighth Circuit which the petitioner is seeking to have this Court review is reported at 785 F.2d 228 (8th Cir. 1986) (A.1-74).

The previous opinions of the Eighth Circuit are reported at 710 F.2d 431 (8th Cir. en banc 1983) (A. 76-105) and 687 F.2d 1135 (8th Cir. 1982).

The trial court's memoranda are not published but are reproduced in the Appendix at A. 106-180.

## JURISDICTION

The Judgment of the Court of Appeals was entered on February 26, 1986. A timely petition for rehearing en banc was denied on May 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United

States Constitution provides in pertinent part:

... [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...

The Sixth Amendment to the United Stastes Constitution provides in pertinent part:

... In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals, sitting en banc, reversed the petitioner's conviction for judicial misconduct. United States v. Singer, 710 F.2d 228, 431 (8th Cir. 1983) (en banc). Throughout the first trial, the District Court Judge, the Honorable Miles W. Lord, interrupted counsel, helped the prosecutor, and so far interjected himself into the proceedings so as to deprive the petitioner of a fair trial.

After the reversal, the trial judge acknowledged helping the prosecutor and told the press:

> People shouldn't be found innocent because of a disparity in their representation.

quoted in United States v. Singer, 785 F.2d 228, 230 n. 2 (8th Cir. 1986).

While preparing for the retrial, Singer's privately retained counsel, Ron-

ald Meshbesher, who had represented him in the first trial and secured the reversal, received a package from the U.S. Attorney containing copies of fifty-six confidential defense documents consisting of both attorney-client communications and attorney work product -- the core of the defense investigation file.[1] The cover letter stated that the file had come into the government's possession from a non-government source and it would not be used in the case-in-chief in the retrial. The U.S. Attorney refused to tell Meshbesher how he had obtained the documents (9/14/-83, p. 11).

On September 14, the day the retrial was to begin, Singer moved for an order to dismiss the indictment for prosecutorial

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[1]For example, the package contained copies of the following documents: The Case For Mark Singer; Aliases re: United States v. Singer; Response To "The Case Against Mark Singer"; and numerous letters from Mark Singer discussing witnesses, aliases, and exhibits.

and judicial misconduct and on double jeopardy grounds based on the misconduct. In response, the government submitted a vague affidavit of Ron Johnson, the case agent, which stated he had received the documents from an informant who told him the documents "would establish the commission of a crime collateral to the main investigation." (See Affidavit of Ron Johnson).

Meshbesher pressed for the name of the person who had given the government his client's file. The U.S. Attorney's office claimed that the name of the person who procured the file -- the informant -- was privileged and would not be revealed (9/14/83, p. 14). Also, the government maintained it had no duty to return the documents, but did so only gratuitously (Id. at 16).

In camera, Johnson told Judge Murphy that he had received the files from Marshall Stoll, a fugitive and co-defendant

of Mark Singer (In camera, 9/14/83, pp. 3, 5, 20). Stoll had been a fugitive during the first trial. Johnson said Stoll told him an employee in Meshbesher's office had photocopied the documents and given them to her boyfriend, who in turn gave them to Stoll. Johnson then gave them to, Asst. U.S. Attorney Dan Schermer (Id. at 8-16).

Johnson also said he showed Stoll a transcript of Gilbert Singer's trial testimony. (Gilbert Singer is Mark Singer's father, who was a witness for Singer in the first trial) and that Stoll said, "This is complete perjury and I can prove it." Johnson asked him how and Stoll replied, "I have documents from ... Meshbesher's files that will show that." (In camera, 9/14/83, p. 7).

Meshbesher was not allowed to inquire how the "informant" got the documents. The government's assertion of the informant privilege was sustained and

Stoll's name was not disclosed to the defense.

Chief Judge Lord, the U.S. Attorney and Police Chief Insinuate that Meshbesher Suborned Perjury Prior to September 16, 1983 Hearing

The next day, the Minneapolis Star & Tribune published a front-page article concerning the Singer files, quoting the U.S. Attorney, who insinuated that Meshbesher had acted improperly in the first trial. He told the press, "We wanted the public to see it [the file] ... It might be an indication why some one would produce it for us." (See Minneapolis Star & Tribune article dated 9/15/86).

Then, on September 16, 1983 the Minneapolis Star & Tribune published a second front-page article entitled: **"FILE PROMPTS BOUZA, LORD TO QUESTION MESHBESHER CONDUCT."** Minneapolis Police Chief Anthony Bouza and Chief Judge Lord were quoted as saying the documents showed that

Meshbesher had allowed a witness to perjure himself (See Minneapolis Star & Tribune article dated 9/16/83). Incredibly, both Lord and Bouza acknowledged they had not even read the documents. Nevertheless, Chief Judge Lord was quoted as saying he told the U.S. Attorney "in my opinion an outside prosecutor should be brought in to review the case ... I thought there was enough here to have someone from the outside come in ..." (Id.)

Further, Bouza told the press that the documents had been leaked by one of Meshbesher's employees. This was the first hint of how the documents were procured. Also, Bouza said Johnson took the documents to Judge Lord because "there was not much interest" in the U.S. Attorney's office (Id.)

These newspaper articles clearly set the tone and agenda for the hearing on September 16, 1983. The government attor-

neys insinuated throughout the hearing that Meshbesher was simply attempting to discover the facts of the government's investigation into his behavior rather than discover the source of the leak in his office and vindicate his client's rights.

Again, Asst. U.S. Attorney Lee said the government had acted properly in taking the documents, and "it is a fact of life that this happens with regularity and that it is approved by the courts." (9/16/-83, pp. 13-14).

Lee also argued that Meshbesher's purpose in having the hearing was directly "out of his concern for himself." (Id. at 25, see also 14). Meshbesher questioned Dan Schermer, the Asst. U.S. Attorney who received the documents from Johnson. While being examined as a witness, even Schermer objected to questions on the basis that the answers might reveal infor-

mation about a "potential criminal case." (9/16/83, p. 34).

Judge Lord's Improper Ex Parte Request to the Prosecutor to Bolster the Record for Appeal

Additionally, Meshbesher asked Schermer if he had ever had an ex parte contact with Judge Lord concerning Mark Singer's case. Schermer admitted that while Singer's motion for a new trial was pending, Judge Lord had called him to his chambers and told him to prepare a memorandum and an affidavit to file with the court to strengthen the record for appeal (Id. at 51-55). Schermer complied with Lord's advice and submitted an affidavit which was later considered on appeal. Schermer had one other ex parte contact with Judge Lord, after the verdict but before sentencing, where he and Judge Lord speculated about whether a co-defendant was alive (11/3/83, p. 15, 20). Johnson

was apparently present during both ex parte contacts (Id. at 21-25).

After the government's insinuations and front-page articles, Meshbesher began to feel he had to almost defend himself in the proceedings. He requested permission to withdraw as trial counsel. He told the court he could not effectively represent the defendant in view of the newspaper allegations and the "threat of prosecution" hanging over his head (9/16/83, pp. 55-56). Asst. U.S. Attorney Noel demanded the petitioner's consent on the record (Id. at 65). The petitioner reluctantly agreed to Meshbesher's withdrawal as trial counsel because of "his conflict position" that had arisen in the last seven days, (Id. at 64), but only on the condition that Meshbesher continue to represent him on the motion to dismiss the indictment (Id. at 50, 67).

Judge Lord's Letter to Judge Murphy and His Comments to the Press: September 20, 1983 Hearing

On September 20, 1983, Judge Lord wrote directly to Judge Murphy and offered to testify. He also disparaged the defense counsel stating:

> "It has been my experience that defense counsel in criminal cases are much more interested in questions than in answers." (9/20/83, p. 4).

Judge Lord had also continued to discuss the case with both newspaper and television reporters. On the evening of September 16, 1983, he said in a television interview that Meshbesher was "in trouble" and just trying to "make hay" with him (Id. at 6).

The Asst. U.S. Attorneys continued to indicate that Meshbesher had a conflict with his client because of his "personal concerns." Asst. U.S. Attorneys Lee and Noel demanded that Singer waive any conflicts or the government would move to

disqualify Meshbesher (9/20/83, p.32).

Noel stated:

> If Mr. Singer, after consulting with Mr. Meshbesher, is not willing to waive, that is, by colloquy, to place on the record a knowing, intelligent, voluntary waiver of the conflict of interest which the government feels is apparent on its record, the government would have a motion to disqualify Mr. Meshbesher from further representations of Mr. Singer on the motion to dismiss. Just so it's clear that that's the government's position. (9/20/83, p. 32). (emphasis added).
>
> * * *
>
> [T]he government is not in a position to discuss with you [Mr. Singer] anything it may or may not know about your attorney. Do you understand that anything which may subsequently come to light about this conflict is in no way going to be a ground for you to move for any kind or relief based on ineffective assistance of counsel ...? (9/20/83, pp. 35-36) (emphasis added).

Singer replied that he would like Meshbesher to continue as his attorney

because he knew the case so well (Id. at 34).

Meshbesher asked the government to disclose anything which could cause a conflict of interest between him and Singer because he personally did not know of anything (9/20/83, p. 39). Meshbesher said that he felt he had to withdraw not because of a conflict but rather because the government's insinuations would chill his zealous representation of Singer at trial. He did not believe he had an actual conflict based on his conduct because he had done nothing wrong (Id. at 38-41). The Asst. U.S. Attorneys refused to supply any information specifying the conflict (Id.).

The Private Conclusions of the U.S. Attorney and the F.B.I.

Documents made part of the record by the Eighth Circuit show that the private conclusions the U.S. Attorney had reached were much different than the public accusa-

tions and insinuations being made. Before the public accusations against Meshbesher, before the Asst. U.S. Attorneys claimed Meshbesher was conducting the hearing because of his personal concerns, before the Asst. U.S. Attorneys asserted Meshbesher had a conflict apparent on the record, and before they demanded Singer waive the conflict or they would move to disqualify Meshbesher, the U.S. Attorney had declined any perjury prosecution because there "were no substantial perjury allegations to prosecute." (See F.B.I. memo dated 9/6/-83).

After the U.S. Attorney came to that conclusion, he referred Johnson and the documents to the F.B.I. for review. On Sept. 2, 1983, Blay, the F.B.I. agent in charge of the Minneapolis office, advised the U.S. Attorney "there was no apparent indication of a Federal violation." (See F.B.I. memo dated 10/3/83; memo dated 9/6/-

83). Blay said that the documentation furnished by Johnson "does not appear to support his allegations that GILBERT SINGER committed perjury," but rather, "appear to support the testimony of GILBERT SINGER." (F.B.I. memo dated 9/6/83).

Further, Judge Lord was informed by the U.S. Attorney and the F.B.I. that the perjury accusations were baseless before he made prejudicial accusations in the press. (See F.B.I. memoranda dated 9/6/83, 9/8/83, 10/3/83).

One F.B.I. memorandum also indicates that Judge Lord had Johnson brief him, so Judge Lord could "brief Judge Murphy before the retrial." (See F.B.I. memo dated 9/8/83).

The Eisele Hearings

Because of Judge Lord's letter, Judge Murphy recused herself on the petitioner's motion, and Judge Thomas Eisele (E.D. Ark.) was designated to hear the

motion. He ruled that Judge Lord's misconduct did not warrant dismissal of the indictment. His rationale in denying the motion on that ground was that the government should not lose the right to prosecute an accused because of a judge's behavior (11/9/83, p. 11). He found, however, that Judge Lord "obviously felt the government attorneys were not adequately presenting certain issues" in the first trial (Id. at 10).

Judge Eisele expanded the hearing on prosecutorial misconduct and ordered Stoll's name disclosed to the defense (In camera 12/9/83, pp. 1-13). Stoll said that he showed Johnson the Singer defense file to prove he was not as deeply involved in the conspiracy as Gilbert Singer's testimony had indicated. However Stoll was not sure whether the stolen defense file would support his claim (12/ 14/83, pp. 67-70). Finally, Johnson told Stoll

he wanted all the documents from the defense file, not just those involving Gilbert Singer. Upon hearing this information, Asst. U.S. Attorney Schermer told Johnson to get the complete file.

Johnson further testified he initially took the file to the U.S. Attorney's office. After the U.S. Attorney refused to prosecute a perjury case, he went to Judge Lord (12/15/83, pp. 308-309). In this meeting Johnson showed Judge Lord a DEA report he prepared about the defense file (Id. at 308). He did not show Lord the documents. Johnson also testified that he was still investigating the perjury claim:

> Q: [By Mr. Meshbesher]:
> Didn't you want to find out who had given him my file?
> A: [By Sergeant Johnson]: Yes.
> Q: Why did you want to know that?
> A: They may be very good witnesses in my perjury investigation, Mr. Meshbesher.
> Q: You wanted to know how you

> could get to someone in my office, didn't you?
> A: I'm looking for further information to a perjury investigation, and I would be certainly happy to obtain evidence from anyone who would be willing to give it to me. (12/15/83, p. 328).

Judge Eisele Refuses to Order Disclosure of the Employee Who Stole the File, the Person Who Leaked the Story to the Press, And Whether the United States Actually Had an Active Perjury Investigation

Meshbesher tried to establish the chain of persons actually responsible for stealing the documents from his office, but Judge Eisele did now allow Stoll to be questioned about who had given him the documents. Thus, the leak in Meshbesher's office has never been uncovered (12/14/83, pp. 43, 118).

Meshbesher tried to establish who in the government leaked the story about the alleged perjury investigation to the press by questioning the reporter, but Judge Eisele sustained assertion of the reporter's privilege pursuant to United States

v. Criden, 633 F.2d 346 (3rd Cir. 1980), cert. denied, 101 S.Ct. 924 (1981).

Meshbesher also tried to establish that the United States had declined any perjury prosecution, but Judge Eisele sustained the U.S. Attorney assertion of "executive privilege". Thus the U.S. Attorney would not confirm or deny the existence of any investigation (12/15/83, pp. 413-416, 486).

The Eisele Findings and Remedy

Judge Eisele found that an objective person, reviewing the defense files would not come to the conclusion that Meshbesher had suborned perjury and that there was no reasonable basis for such a conclusion (12/16/83, pp. 28-29).

Judge Eisele, however, did rule that the government could receive attorney-client and work product documents protected by the sixth amendment if the person procuring them represented that they contain-

ed evidence of collateral crimes (12/21/-83, p. 6). He did not specify that either the attorney or the client had to be involved in the collateral crime (Stoll, significantly, had never made such a representation.) Because in this case the government accepted all the documents from the defense file, and not just the ones represented as containing evidence of collateral crimes, Judge Eisele held the government had purposefully and impermissibly intruded upon Singer's sixth amendment rights (Id. at 7-9).

Judge Eisele further stated that few, if any, of the documents contained evidence of perjury. He found, "The real evidence here of perjury by Gilbert Singer, if indeed there be any, is the anticipated contrary testimony of Mr. Stoll, assuming he is to be believed." (Id. at 7, 8-9).

Although Judge Eisele found the government did not intend to prejudice the attorney-client relationship between Meshbesher and Singer, he found there were "obvious adverse effects." He "condemned the leaking of information not truly based upon fact which of necessity would be harmful to Mr. Meshbesher and to his relationship with his client, Mr. Singer." (Id. at 18-19). Consequently, he stated "that law enforcement officials charged with the prosecution of the case ... improperly leaked information to the press which ... had the effect of interfering with the attorney-client relationship between Mr. Singer and Mr. Meshbesher ..." (Id. at 20). He further stated:

> [T]he perjury alluded to was supposed to have occurred in the first trial of this case, and the suggestion that such in fact occurred and that Meshbesher had a part in bringing it about can only be regarded

> as extremely prejudicial to the defendants in this case. (12/21/83, p. 19).

The Remedy

As a remedy, Judge Eisele ordered the government to return the defense file to the defendant, except "the documents which it specifically represents to the court contain evidence of perjury by Mr. Gilbert Singer or evidence of subornation" (12/16/83, p. 15). Second, he ordered that all government attorneys who had read the documents or discussed them could not participate in the retrial of the case (Id.). Third, he ordered Sgt. Johnson and all other law enforcement officers having any knowledge of the defense file never to mention, use, or refer to it while working with the attorney assigned to try the case.

The U.S. Attorney Retains Documents For The Alleged Perjury Investigation

Even though the U.S. Attorney and the F.B.I. concluded the file did not con-

tain evidence of perjury, the government retained five of the defense documents, thus creating the impression of an active investigation.

Judge Eisele's order allowed Sgt. Johnson, Sgt. Strauss, Marshall Stoll and Judge Murphy -- all persons who had read the documents -- to participate in the retrial of the case. The retrial was returned to Judge Murphy.

Finally, Judge Eisele, in regard to the inference with counsel of choice issue, concluded:

> But can it truly be argued that the adverse publicity has rendered Mr. Meshbesher's participation at the retrial untenable? Either a continuance or a transfer to another district for trial could, the Court suggests, solve the problem. (12/21/83, p. 23).

Judge Eisele never discussed the ethical dilemma the government had improperly created.

The Retrial

Before trial, Singer moved to reopen the hearing on prosecutorial and judicial misconduct and for a change of venue. Judge Murphy denied the motion. Singer further requested Judge Murphy to appoint Meshbesher as his counsel. She said that she normally does not allow counsel to withdraw in a criminal case, but felt it would not be "appropriate in any circumstances for the court to appoint Meshbesher in this case." (3/7/84, pp. 1-9). Meshbesher had made financial arrangements with Singer about legal fees before the stolen file issue arose; he did not withdraw because Singer lacked funds. Meshbesher told Judge Murphy that he could not represent Singer because of the threats of prosecution and because he could not guarantee the security of Singer's defense file, since he did not know which employee had copied the file (3/7/84, pp. 1-9).

Sergeant Johnson worked as case agent at the retrial and testified. Stoll testified to subjects that had been discussed in the defense files.

Immediately before trial, two of Singer's codefendants, Arturo Izquierdo and Oakley Cline, pled guilty after the government offered them plea bargains. They each received a six-month jail sentence, the same sentence Stoll had obtained. Judge Murphy accepted these plea bargains. Co-defendant Sazenski was acquitted in the trial. Co-defendant John Reynolds was sentenced to three years. Singer was convicted on two counts on June 12, 1984. On August 22, 1984, Judge Murphy sentenced him to two consecutive five-year terms for a total of 10 years.

The Opinion of the Eighth Circuit

In respect to the Sixth Amendment violation, the Eighth Circuit held that Judge Eisele's order was effective to elim-

inate "any demonstrable prejudice, or any substantial threat thereof" so a reversal or dismissal of the indictment was not appropriate under United States v. Morrison, 449 U.S. 361 (1981).

The Circuit Court used alternate holdings. First, the majority of the panel interpreted Judge Eisele's brief statement that Meshbesher's continued representation may not be untenable if the trial was continued or venue changed as a finding that no prejudice resulted from the government's claim. Without any analysis of the issue or the facts, the court subjected this conclusion to the clearly erroneous standard citing United States v. Costanzo, 740 F.2d 251, 254-55 (3rd Cir. 1984), cert. denied, 105 S.Ct. 3477 (1985).

Alternately, the court held:

> [E]ven if government officials' statements to the

> press did create in Meshbesher a conflict of interest requiring withdrawal, there is no claim that Singer's appointed counsel rendered ineffective assistance. We thus reject these arguments. (Emphasis added).

United States v. Singer, 785 F.2d at 236. The majority opinion did not contain any further discussion of Meshbesher's ethical duties.

Judge Bright dissented and stated:

> Against the background of the government's highly improper conduct, Meshbesher had no choice except to withdraw. In my opinion Judge Eisele's order did not serve as a curative for the government's misconduct.

Double Jeopardy

The court rejected the petitioner's double jeopardy plea, but recognized that although the "issue had percolated in the dicta through the several circuits, it has yet to be addressed by the Supreme Court." United States v. Singer, 785 F.2d 228 (8th Cir. 1986). The court also stated that

the issue was a "complicated and close question." Id. at 239-240.

The court did not resolve the legal issue because it did not believe Judge Lord's behavior manifested the intent required to implicate double jeopardy concerns.

Singer petitioned the Eighth Circuit for a rehearing en banc but the request was denied with Judges Lay, Arnold, and Heany dissenting.

## REASONS FOR GRANTING THE WRIT

This case presents important, unsettled, recurring Constitutional questions. First, this Court has considered, but never answered, the question what is the proper standard for reviewing and remedying a wrongful deprivation of a criminal defendant's privately retained counsel of choice.

Second, this Court has never answered the question whether the Double Jeopardy Clause bars a retrial after a reversal for judicial misconduct, and if so, what is the proper standard to resolve such a claim. This case squarely presents both issues, and given the state of the law in the Circuit Courts, these issues are ripe for review in this Court.

### I.

### THE EIGHTH CIRCUIT'S OPINION REQUIRING A DEFENDANT TO DEMONSTRATE PREJUDICE TO OBTAIN RELIEF FROM THE WRONGFUL DENIAL OF HIS OR HER RIGHT TO COUNSEL OF CHOICE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS, AND, IN EFFECT, ELIM-

INATES THE RIGHT BY ELIMINATING THE REMEDY.

The right of a defendant to have a privately retained defense counsel of choice has repeatedly been recognized in the Circuit Courts of Appeals, e.g., United States v. Sheiner, 410 F.2d 337, 342 (2nd Cir. 1969); United States v. Laura, 607 F.2d 52 (3rd Cir. 1979); United States v. (Under Seal), 774 F.2d 624, 627 (4th Cir. 1985); Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978); Wilson v. Mintzes, 761 F.2d 275, 284 (6th Cir. 1985) (comprehensive analysis); United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982); Releford v. United States, 288 F.2d 298 (9th Cir. 1961); United States v. Burton, 584 F.2d 485, 488-89 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

The right to privately retained defense counsel has also been repeatedly recognized by this Court, e.g., Powell v. Alabama, 287 U.S. 45 (1932); Glasser v. United States, 315 U.S. 60, 75 (1942);

Chandler v. Fretag, 248 U.S. 3,9 (1954); Crooker v. California, 357 U.S. 433, 439 (1958).

In the seminal case of Powell v. Alabama, the right to counsel of choice was established as a fundamental right secured by the constitutional guarantee to due process of law. 287 U.S. 647-71. Other cases have held the right to counsel of choice is also secured by the Sixth Amendment. Wilson v. Mintzes, 761 F.2d 275, 278 (6th Cir.); United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979).

In Laura, the court summarized its view on the right to privately retained counsel as follows:

> We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a de-

fense.

Defining the dimensions of the right to counsel of choice has spawned litigation, some of which has reached this Court. Morris v. Slappy, 461 U.S. 1 (1983); Flanagan v. United States, 465 U.S. 259 (1984) See also Richardson-Merrell v. Koller, 472 U.S.___, 86 L.Ed.2d 340 (1985) (dicta).

Despite this repeated recognition of the right, the United States, in Flanagan v. United States, 465 U.S. 259 (1983), took the official position that a criminal defendant does not have a constitutionally protected right to privately retained counsel of his or her choice. Brief For The United States at 38-41, Flanagan v. United States.

However, in Flanagan, the Court did not reach the issue whether a defendant has a right to privately retained counsel of choice, or the closely related issue of whether prejudice will be presumed from the wrongful denial of the right. The

Court refused to reach these issues and held that a pretrial disqualification of counsel was not an appealable order. Therefore, if a defendant is wrongly denied his or her privately retained counsel of choice, the deprivation must be reviewed from a judgment of conviction, obtained while the defendant was represented by other counsel. Thus, the standard of review applied is critical.

Generally, the question is whether prejudice will be presumed by a wrongful deprivation, or whether actual prejudice will have to be demonstrated.

In Richardson-Merrell v. Koller, 472 U.S. ___, 86 L. Ed.2d 340 (1985), Justice O'Connor wrote:

> This Court has never held that prejudice is a prerequisite to the reversal of a judgment following the the erroneous disqualification of counsel in either a civil or a criminal case.

Id. at 351.

Although this case does not involve a disqualification order, a wrongful interference with the right to counsel of choice stemming from governmental misconduct should be subject to the same standard because the same right is at stake.

How the right to counsel of choice will be protected is of great constitutional importance. This Court should decide this issue.

The Eighth Circuit Court of Appeals' decision in this case -- that even if Singer was wrongly denied his counsel of choice, the violation is harmless because he did not demonstrate his second counsel was ineffective -- eliminates the right to privately retained counsel of choice because it eliminates the remedy. Under this standard the only claim is ineffective assistance of counsel.

The Eighth Circuit's standard also conflicts with the opinions expressed by individual justices of this Court. Jus-

tice Stevens, in his dissent in the Richardson-Merrell case, specifically stated that prejudice should be presumed from a wrongful deprivation of a criminal defendant's counsel of choice. 472 U.S. at ___, 86 L.Ed.2d at 354. ("[I]n a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal ...").

In Morris v. Slappy, Justice Brennan's concurring opinion, which Justice Marshall joined, stated that the presumption of prejudice rule was the proper standard for reviewing wrongful interference with a defendant's counsel of choice. 461 U.S. at ___, 75 L.Ed. at 629. Justice Brennan explicitly rejected the ineffective assistance standard applied by the Eighth Circuit in this case. Id. at 629-30.

Most of the Circuit Courts conflict with the Eighth Circuit opinion in this case requiring a showing of actual preju-

dice to obtain a reversal for the wrongful interference with the right to counsel.

The Third Circuit held in United States v. Rankin, 779 F.2d 956 (1986), that a "defendant 'need not show that the dismissal' of counsel 'was prejudicial.'" Id. 961. See also United States v. Laura, 607 F.2d 52, 58 (3rd Cir. 1979) (same). Further, the Third Circuit explicitly rejected the harmless error standard enunciated by the Eighth Circuit:

> [T]he denial of one's selected lawyer is quite different from a claim of ineffective counsel where a harmless error test is appropriate. ... 'The right is either respected or denied; its deprivation cannot be harmless.' McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8 (1984).

779 F.2d at 960.

The Fifth Circuit, in Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978), has also held that prejudice is presumed from a wrongful interference with counsel of

choice. Id. at 1326. The Court in Gandy stated:

> [I]t is of no relevance that substitute counsel has not been shown to have performed incompetently or ineptly. The claimed deprivation is an aribitrary encroachment on the right to counsel of choice not a claim of ineffective assistance rendered in the performance by the substitute counsel. Id.

The rule in the Sixth Circuit is that "[e]vidence of unreasonable or arbitrary interference with an accused's right to counsel of choice ordinarily mandates reversal without a showing of prejudice." Wilson v. Mintzes, 761 F.2d 275, 281 (6th Cir. 1985) (contains a thorough review of circuit law). See also Linton v. Perini, 656 F.2d 207, 211-12 (6th Cir. 1981). The Sixth Circuit, too,explicitly rejected the ineffective assistance analysis adopted by the Eighth Circuit. 761 F.2d at 285.

The Ninth Circuit has repeatedly held that "denial of a criminal defendant's qualified right to retain counsel

of his choice is reversible error regardless whether prejudice is shown." United States v. Washington, 782 F.2d 807, 813 (9th Cir. 1986). See also United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984) (same); United States v. Greger, 657 F.2d 1109, 1113 (9th Cir. 1981), cert. denied, 461 U.S. 913 (1983) (same); Releford v. United States, 288 F.2d 298, 301 (9th Cir. 1961) (same).

This Court should not be deterred from reviewing this case because of the Eighth Circuit's alternate holding that the petitioner's attorney was not "forced" to withdraw. Therefore he was not prejudiced.

First, alternate grounds for a holding are considered independent, and not dicta. See United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949). Thus, the court's alternate holding that Singer's Sixth Amendment

right was not violated "even if government officials' statements to the press did create a conflict of interest, requiring withdrawal, [because] there is no claim that Singer's appointed counsel rendered ineffective assistance," creates a precedent properly subject to review by this Court.

Second, Meshbesher withdrew. Therefore Singer lost his privately retained counsel of choice. This is not disputed. At no time has the good faith of his withdrawal been questioned. Indeed, as shown above, Judge Murphy did not feel it was "appropriate in any circumstance" to allow Meshbesher to continue as Singer's counsel, even though Singer requested it.

Third, Meshbesher clearly had an ethical duty to withdraw because of the false criminal accusations being made against him.

Judge Eisele's order, which focused only on the impact of the prejudicial pub-

licity, did not address Meshbesher's ethical duties. In fact, Eisele's order further interfered with Meshbesher's representation of Singer because it allowed the government to retain parts of the stolen file for the alleged collateral perjury investigation thus making the threat of prosecution appear real. Then, the government did in fact retain documents.

However, the F.B.I. memoranda make clear that prior to retaining these documents, the U.S. Attorney and the F.B.I. had determined that the documents did not support any perjury charge.

Fourth, Meshbesher could not assure Singer his future confidences would be kept because Judge Eisele did not order the government to disclose which employee in Meshbesher's office stole the file. The government did not voluntarily disclose the person's name. This was an intolerable situation given a lawyer's ethi-

cal duty to keep his client's confidences and secrets.

Finally, the Eighth Circuit also did not address Meshbesher's ethical duty to withdraw. The Eighth Circuit completely ignores that the Assistant U.S. Attorneys demanded that Singer waive the conflict they believed "apparent on the record" or they would move to disqualify Meshbesher. The Eighth Circuit's opinion concludes that Meshbesher did not have to withdraw, but never analyzes whether a conflict developed from the baseless accusations of subornation of perjury that would impair his zealous and loyal representation of Singer at trial. The Circuit Court's decision permits the government, through gross misconduct, to force a defendant to elect between conflict-free representation and the right to counsel of choice.

In Wood v. Georgia, 450 U.S. 261, 271 (1981) this Court wrote:

> Where the constitutional right to counsel exists, our Sixth

> Amendment cases hold that there is a cordrelative right to representation that is free from all conflicts of interests.

Where a defendant is entitled to a number of rights, he is entitled to all such rights and cannot be forced to barter one for the other. When the exercise of one right is made contingent on forbearance of another, both rights are corrupted. United States Ex Rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3rd Cir. 1977). Singer was entitled to counsel of his choice and conflict-free representation. The government made one right contingent upon forbearance of the other by falsely accusing Meshbesher of suborning perjury.

The Eighth Circuit's Use of the Clearly Erroneous Standard in Reviewing Meshbesher's Ethical Duties Conflicts with the Approach Used by Other Circuits

The Eighth Circuit's failure to independently assess Meshbesher's ethical duties towards his client raises a subsidiary, but critically important question concerning the proper standard for review-

ing claimed interferences with a defendant's counsel of choice. The issue this presents is whether the clearly erroneous test applies not only to the facts found by the trial court concerning the ethical duties, but also to the application of the ethical standards to the facts as found. The circuit courts are in conflict on this issue and this Court has never addressed it.

In United States v. Hobson, 672 F.2d 825 (11th Cir. 1982), cert. denied, 459 U.S. 906, the Eleventh Circuit held that the proper standard of review was to apply the clearly erroneous test to issues of fact, but independently apply the ethical standards to those facts. (It is significant to note that in Hobson, the attorney was disqualified to avoid the appearance of impropriety because of alleged personal knowledge of some of the criminal activity which was the subject of the case. The court felt the attorney's credibility may

become an issue before the jury. This is similar to the situation Meshbesher was in, except the appearance of impropriety was improperly created by the government and Judge Lord).

The Eleventh Circuit's position on the independent standard of review has been followed by the Seventh Circuit in Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (11th Cir. 1982) and the Fifth Circuit in United States v. Snyder, 707 F.2d 139, 144 (5th Cir. 1983).

This approach directly conflicts with the Eighth Circuit's refusal to independently analyze whether Meshbesher's ethical duties, applied to the facts as found, forced him to withdraw.

The application of the clearly erroneous test to the overall issue dilutes the right to privately retained counsel of choice. This Court should accept this case and clarify the standard because it presents an unanswered, important recur-

ring question that is vitally connected to the fundamental constitutional right to privately retained counsel of choice.

II.

THE DOUBLE JEOPARDY ISSUES IN THIS CASE ARE IMPORTANT AND UNRESOLVED.

This case presents questions concerning the law of double jeopardy that are of great importance to the administration of criminal justice. First, does the Double Jeopardy Clause bar retrial of a defendant after his conviction is reversed for judicial misconduct. This Court has never specifically addressed the issue of whether a reversal, as opposed to a mistrial, in this context may create a double jeopardy bar.

Second, a subsidiary question presented is what is the proper standard for resolving a double jeopardy claim based on judicial misconduct.

In United States v. Dinitz, 424 U.S. 600 (1976), the defendant made an unop-

posed motion for a mistrial after the trial judge excluded his attorney from the courtroom for misconduct in his opening statement. The defendant was retried and convicted. On appeal he argued that his retrial was barred by the Double Jeopardy Clause. This Court disagreed because the mistrial was "not attributable to prosecutorial or judicial overreaching." 424 U.S. at 607. The Court, however, stated that the Double Jeopardy Clause

> bars retrial where 'bad faith conduct by judge or prosecutor' ... threatens the '[h]arrassment by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict.' Id. at 611.

The Court applying that reasoning to the case stated that the Double Jeopardy Clause did not bar the retrial since the judge's banishment of the attorney

> was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal. Id. (emphasis added).

To the credit of the federal judiciary, there is a dearth of case law concerning intentional judicial misconduct. However, this Court has stated that if "judicial impropriety justifying a mistrial resulted from the fear the jury was likely to acquit the accused" the Double Jeopardy Clause would bar the retrial of the defendant. United States v. Tateo, 377 U.S. 463, 468 fn. 3; see also United States v. Jorn, 400 U.S. 470, 485 fn. 12.

The government in this case has argued that Oregon v. Kennedy, 456 U.S. 667 renounced the language of the above cases and applied a stricter standard. Further, they have argued that only prosecutorial misconduct intended to provoke a mistrial can raise a double jeopardy bar. This contention is inconsistent with the protections intended to be secured by the clause and the reasoning of the Kennedy case.

In Kennedy, this Court reviewed a case involving prosecutorial misconduct and found that the "bad faith" and "harassment" contained in the above formulations could not be applied in the context of prosecutorial misconduct. The court reasoned:

> The difficulty with the more general standards which would permit a broader exception than one merely based on intent is that they offer virtually no standards for their application. Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt.
>
> * * *
>
> Prosecutorial conduct that might be viewed as harassment or overreaching , even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. Id. at 675 (emphasis added).

The Court's rationale in Oregon v. Kennedy, supra, simply does not apply in the context of judicial misconduct since

every act on the part of the judge is not -- or should not be -- designed to prejudice the defendant. Therefore the problems inherent in applying the broader standard are not present in the context of judicial misconduct. This Court should resolve this question. The Eighth Circuit's opinion improperly failed to reach it.

Howewver, even if the stricter is applied, Lord violated it in this case.

Judge Lord's conduct clearly indicates that he deliberately acted during the defendant's first trial to avoid an acquittal. From the beginning of the trial, Judge Lord felt that Asst. U.S. Attorney Schermer was being overwhelmed by the defense. When Lord requested a second prosecutor and the U.S. Attorney refused to send another attorney, Lord stated "I am not going to try the government's case for it, like I've been doing up to this time." 710 F.2d at 433. At one point,

Judge Lord even told the jury that Schermer was overwhelmed and indicated that the government may not get in evidence and lose the trial as a result. Id. at 435.

Judge Arnold, writing for this Court en banc in reversing the appellant's first conviction, stated:

> On the whole, it seems clear to us that the court believed the evidence of the defendant's guilt was strong, but that the case was a complicated one, and that justice might not be done if the government counsel were left to his own devices. Id. at 436.

The en banc panel also specifically held that the error in the first trial was not harmless error. The court stated:

> [W]e have considered the trial court's conduct in the context of all the evidence and we cannot say that there is no reasonable possibility that the practice complained of might have contributed to the conviction. Id. at 437.

Judge Arnold implicitly recognized that Judge Lord feared an acquittal. Nevertheless, Judge Arnold stated that the case

did not involve "actual bias on the part of the trial judge." Id. at 423. However, Judge Arnold and the en banc Court had not been aware of the extent of Judge Lord's misconduct.

A number of incidents of Judge Lord's misconduct uncovered or committed after the reversal demonstrate his bad faith, if not actual bias and compel the inference that he intentionally worked to avoid an acquittal in the first trial. First, Lord's statement to the press that "People shouldn't be found innocent because of a disparity of their representation," shows that he feared the defendants would be acquitted in the first trial and that he actively worked to avoid that result. Both the Eighth Circuit's opinion and Judge Eisele's order implicitly acknowledges this.

Second, the ex parte contact with Judge Lord initiated with Schermer and his request that Schermer bolster the record

for appeal was clearly intended to secure the convictions. The Eighth Circuit was not aware of this incident on the first appeal. This incident shows that Judge Lord's conduct during the trial was intentional and motivated by fear of an acquittal.

Third, Judge Lord's speculation with Schermer and Johnson about whether missing witnesses were dead or alive was highly inappropriate since it was ex parte and before Judge Lord sentenced the appellant. Again, this provides further insight into the deliberateness of Judge Lord's conduct.

Fourth, Judge Lord's statements to the press suggesting that the defendant's counsel -- and inferentially the defendant -- suborned perjury fits into a general pattern of deliberate misconduct simply extending from the first trial.

Finally, Judge Lord in his letter to Judge Murphy wrote: "It has been my experi-

ence that defense counsel in criminal cases are much more interested in questions than answers." (A. 26). This remark is further evidence supporting the claim that Lord was actually biased against the defendants and prejudiced them in the first trial. The defendant's first trial in this case was marred not only by error, but by Judge Lord's deliberate and intentional error aimed at avoiding acquittal and securing conviction. This conduct allowed the government to determine the strength and weaknesses of the defendant's case for the retrial. The government gained an opportunity to garner more evidence against him which it effectively utilized since in the retrial three former co-defendants were given lenient plea bargains in exchange for their testimony against him.

At this point, it is impossible to intelligently determine what impact Lord's misconduct had on the first trial. The defendant was acquitted on one count of

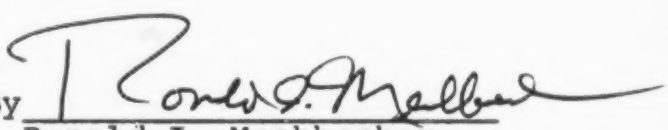
the indictment in that trial. Perhaps the jury would have acquitted on all counts but for Judge Lord's misconduct.

If judicial misconduct will ever lead to a double jeopardy bar, it should in this case. This Court should accept the case for review to clarify the standard for resolving a double jeopardy claim based on judicial misconduct.

## CONCLUSION

For the reasons stated above, the petitioner respectfully requests this Court to grant the writ.

MESHBESHER, SINGER &
SPENCE, LTD.

By 
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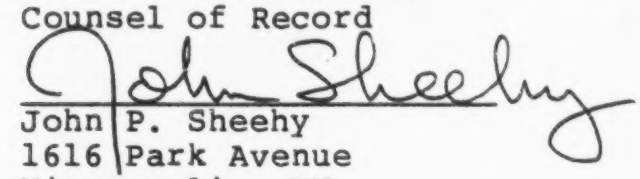
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86-102

No. _____

Supreme Court, U.S.
FILED
JUL 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

# Supreme Court of the United States

October Term, 1986

MARK LEWIS SINGER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME I OF II

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 84-5156

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| United States of America, | * | |
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| Appellant, | * | Appeal from |
| | * | the United |
| v. | * | States Dis- |
| | * | trict Court |
| Mark Lewis Singer, | * | for the |
| | * | District of |
| Appellee. | * | Minnesota. |

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Submitted: May 16, 1985

Filed: February 26, 1986

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Before BRIGHT,[1] ROSS and JOHN R. GIBSON, Circuit Judges.

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JOHN R. GIBSON, Circuit Judge.

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[1]*The Honorable Myron H. Bright was United States Circuit Judge of the Eighth Circuit at the time this case was submitted. He took Senior status on June 1, 1985, before this opinion was filed.

Mark Lewis Singer again appeals after a second jury trial from a conviction of conspiracy to possess and distribute marijuana in interstate commerce, in violation of 18 U.S.C. § 371 (1982), and attempt to distribute marijuana and to aid and abet in the attempt to distribute marijuana, in violation of 21 U.S.C. § 846 (1982) and 18 U.S.C. § 2 (1982). Singer challenges the conviction on five grounds. He argues principally that the prosecution's acquisition and review of his attorney's trial strategy file, and subsequent prejudicial statements to the press, resulted in a denial of his sixth amendment right to effective assistance of counsel. He also contends that the fifth amendment protection against double jeopardy should have precluded his retrial when his first conviction was reversed on the basis of judicial misconduct. He seeks dismissal of the indictment, or alternatively, reversal

of the conviction and a new trial. We affirm the judgment of conviction.

Singer initially was tried and convicted in a jury trial concluding on December 18, 1980, before Judge Miles W. Lord.[2] The conviction was affirmed by a divided panel, United States v. Singer, 687 F.2d 1135 (1982), but reversed on the basis of judicial misconduct by this court en banc, United States v. Singer, 710 F.2d 431 (8th Cir. 1983). This court concluded that Judge Lord's conduct "fell below the Plimsoll line of fairness and the appearance of fairness," id. at 437 (footnotes omitted), and thus "prevented the defendants from having their guilt or innocence determined in a proceeding free of the

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[2]The Honorable Miles W. Lord was United States District Judge for the District of Minnesota at the time this case first was tried. He retired under 28 U.S.C. § 371 (a) on September 11, 1985.

fatal appearance of unfairness." Id. at 432.[3]

Retrial was set for September 14, 1983, before Judge Diana E. Murphy.[4] Five days before trial, the United States Attorney delivered to Singer's counsel, Ronald I. Meshbesher, a letter enclosing materials that he stated "came into possession of the United States from a non-government source." Appellant's Addendum at 2. The materials were copies of 56 documents from Meshbesher's attorney-client file relating to his representation of

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[3]Defense counsel had moved on 15 occasions during trial for mistrial based on Judge Lord's conduct. United States v. Singer, 710 F.2d at 434 n. 2. After this court's reversal of the conviction, Judge Lord reacted, as quoted in the Minneapolis Star and Tribune: "It's up to the judge to see that a fair trial results. People shouldn't be found innocent because of a disparity of their representations. Appellant's Addendum at 1.

[4]The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

Singer. Singer moved immediately to dismiss the indictment for prosecutorial misconduct.

At the motion hearing, Assistant United States Attorney Daniel W. Schermer, who had tried the government's case against Singer, testified that the confidential documents were obtained two years after Singer's conviction by Minneapolis Police Sergeant Ronald Johnson. The source was Marshall Stoll, an indicted co-conspirator of Singer who was a fugitive at the time of the first trial, who in turn had received them from a third person. Schermer further stated that Stoll, before delivering the documents, claimed that they provided proof that perjury had been committed at trial. during the opening days of the motion hearing, reports appeared in the news media quoting the Minneapolis Chief of Police and Judge

Lord, then Chief Judge, that the contents of the confidential file showed that Gilbert Singer, the defendant's father, had at trial committed perjury and had done so with Meshbesher's approval. Similar statements issued from the United States Attorney's office. Then, on September 20, 1983, Judge Lord sent a letter to Judge Murphy stating that "it has been my experience that defense counsel in criminal cases are much more interested in questions than in answers," Appellant's Addendum at 26, and offering to testify in the Singer matter. Schermer also testified at the hearing that between the time of Singer's conviction and his filing of post-trial motions, Judge Lord had initiated an ex parte meeting with Schermer to express his concern over the adequacy of the trial record. According to Schermer, Judge Lord urged the government to provide additional documentation to avoid reversal on appeal.

Based on the statements and conduct of Judge Lord, the United States Attorney's office, and police officials, Singer moved to enlarge the basis of his motion to dismiss the indictment to encompass governmental misconduct. He further moved for Judge Murphy's recusal because of her position as judge in the district in which Judge Lord was chief judge. Finally, because he believed that the newspaper statements and the possibility of prosecution for subornation of perjury would chill his ability to zealously represent Singer, Meshbesher requested the court's permission to withdraw from the case. Singer consented to Meshbesher's withdrawal as trial counsel, provided that Meshbesher continue to represent him on the motion to dismiss the indictment. Judge Murphy granted the request.

On September 27, 1983, Judge Murphy recused herself from presiding over the hearing on the motion to dismiss the indictment. Chief Judge Lay of this court then designated Judge G. Thomas Eisele[5] of Arkansas to rule on Singer's motion to dismiss.

**Hearings Before Judge Eisele.**

Judge Eisele conducted hearings in November and December, and on December 21, 1983, issued oral Findings of Fact and Conclusions of Law.[6] Judge Eisele found that misconduct had occurred when government officials obtained the confidential attorney-client file, and again when

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[5]The Honorable G. Thomas Eisele, Chief Judge of the United States District Court for the Eastern District of Arkansas, sitting by designation.

[6]Judge Eisele orally entered findings and conclusions throughout the hearing, and incorporated them by reference into the ruling of December 21.

they made prejudicial statements to the press. As a result, Singer's sixth amendment right to counsel had been violated. He concluded, however, that the violation did not warrant dismissal of the indictment. Rather, Judge Eisele fashioned remedies to remove on retrial any prejudice to the defendant that might result from the governmental misconduct and the resulting constitutional violation. Judge Eisele also found that Judge Lord had indeed initiated at least one ex parte contact with the prosecuting attorney, and concluded that the contact was improper. He concluded, however, that Judge Lord's various acts of misconduct neither would prejudice Singer on retrial nor did they demonstrate the intent to prejudice Singer required to raise a valid double jeopardy concern. Therefore, the motion to dismiss was denied.

Judge Eisele first considered the circumstances under which the government received Meshbesher's attorney client file. Immediately before or at the time of trial in December 1980, he found, an employee in Meshbesher's law office who in no way was connected with the government or with any law enforcement agency photocopied the confidential file. Marshall Stoll, the indicted co-conspirator fugitive-turned-informant, obtained the file no later than spring 1981. Judge Eisele, to protect Stoll's fifth amendment right against self-incrimination, did not require Stoll to disclose how or from whom he had obtained the file. Stoll surrendered, pleaded guilty, and agreed to cooperate on August 19, 1982.

Judge Eisele found further that around October 1, 1982, Stoll, pursuant to the plea agreement, met with Sergeant John-

son. Both Johnson and Assistant United States Attorney Schermer already had suspected that Gilbert Singer had testified falsely. Johnson gave Stoll a transcript of Gilbert Singer's trial testimony. Stoll confirmed the government officials' suspicions. Stoll then told Johnson that he had copies of documents from the Meshbesher file, which he would supply that could in part prove that Gilbert Singer had lied. Johnson relayed Stoll's assertion and offer to Schermer. Stoll later repeated his assertion and offer directly to Schermer. Judge Eisele found that Schermer, after examining the law, believed in good faith that the government properly could accept and examine the file. Johnson thus received the file from Stoll.

Judge Eisele, reviewing the law, agreed that the government properly may receive confidential documents if it plays

no role in their wrongful procurement and if it has probable cause to believe they constitute proof of criminal activity. However, he continued, the government also must conscientiously endeavor to obtain no more documents than support the representations of wrongdoing. Stoll's rerpresentations, the Judge found, combined with the government agents' suspicions, created probable cause to permit a limited examination of the file. The Judge also found, however, that the government had made no effort to have Stoll select only the documents that substantiated his allegation, but actively encouraged him to turn over the entire file. Thus, Judge Eisele concluded, because the government did not undertake to obtain only the relevant materials, and in fact had reviewed defendant's confidential trial strategy files irrelevant to Stoll's allegation of the collateral crimes, it had knowingly intrud-

ed, though in good faith, into the attorney-client relationship. Since the intrusion threatened to prejudice defendant on retrial, the government had violated Singer's sixth amendment right to effective representation of counsel.

Judge Eisele observed, nevertheless, that the sixth amendment violation did not warrant dismissal of the indictment. Rather, he looked to United States v. Morrison, 449 U.S. 361 (1981), which holds that in cases of sixth amendment violations, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." Id. at 668 (footnote omitted). He reasoned that under Morrison the proper course was to tailor a remedy that would neutralize the threat to remove upon retrial any possibility of prejudice to the

defendant as a result of the governmental misconduct. Therefore, Judge Eisele denied defendants' motion to dismiss the indictment.

Judge Eisele proceeded to fashion a remedy which he concluded would effectively insulate Singer on retrial from the taint of the constitutional violation. Judge Eisele ordered that: (1) the government return all documents from the file except those which it specifically represented contained evidence of perjury by Gilbert Singer and subornation of perjury by Meshbesher, to disrupt the Meshbesher-Singer attorney-client relationship. Such publicity, Singer asserted, resulted in a violation of his sixth amendment right to effective representation by the counsel of his choice. The Judge found that law enforcement officials involved in the prosecution of the case improperly leaked un-

proven assertions to the press which potentially compromised Meshbesher's effectiveness as an advocate. He also found that while there was no intent to prejudice defendant upon retrial or to interfere with the attorney-client relationship, the effect of such leaks was to threaten prejudice to Singer. He therefore acknowledged the existence of a sixth amendment deprivation. Nevertheless, Judge Eisele concluded that Meshbesher's continued representation of Singer was not untenable, that he was not compelled to withdraw. Again, relying on United States v. Morrison, the Judge concluded that a remedy less drastic than dismissal of the indictment could properly be tailored. He reasoned that the passage of time or retrial in a different locale would serve adequately to dissipate any potential prejudice and allow Singer continued representation by his chosen counsel. He therefore permitted

Singer to move for a continuance or change of venue. Singer declined to so timely move. Meshbesher maintained his withdrawal.

Finally , Judge Eisele considered whether Judge Lord's various acts of judicial misconduct warranted dismissal of the indictment. He found that Judge Lord improperly had initiated at least one ex parte contact with Schermer shortly after Singer's conviction in December 1980. He concluded, however, in view of this court's action granting a new trial before a different judge, that the taint of judicial misconduct had been removed. Further, relying on United States v. DiFrancesco, 449 U.S. 117 (1980), which holds that the double jeopardy clause does not bar retrial unless the conviction is reversed for insufficient evidence, Judge Eisele further concluded that even when

combined with the earlier acts of misconduct which formed the basis of this court's reversal of Singer's first conviction, Judge Lord's conduct did not demonstrate an intent to prejudice. Judge Lord's conduct thus did not raise a valid double jeopardy concern to prevent the government from retrying Singer.

**Retrial Before Judge Murphy**

The case was returned to Judge Murphy for retrial. Pursuant to Judge Eisele's order, two Assistant United States Attorneys from the District of North Dakota, who had no prior involvement in the case, were assigned to prosecute. Johnson was replaced as case agent, although he continued to assist in the preparation of the case. Singer was represented by appointed counsel.

Before trial, Singer moved to disqualify Johnson and Stoll from serving as witnesses on grounds that they were familiar with the contents of the improperly obtained file. The motion was denied. At trial, Johnson testified principally to the events leading to the government's seizure of marijuana in Minneapolis. He also testified to his analysis of telephone and shipping records offered to implicate Singer in the conspiracy. Stoll testified extensively to his association with Singer, and to their specific acts and respective roles in the conspiracy. On cross-examination, he admitted to numerous past crimes and to his understanding that he likely would receive a reduced sentence in exchange for his testimony. Singer's counsel also sought to cross-examine Stoll regarding his acquisition of the Meshbesher file. Over objection, Stoll was permitted to invoke the fifth amend-

ment privilege against self-incrimination. Singer then moved to strike Stoll's entire testimony. The motion was denied.

The government produced additional evidence of Singer's complicity in the conspiracy. A Miami police officer testified that he arrested Singer at an air freight office as Singer was delivering several hundred pounds of marijuana for shipment to Minneapolis and San Francisco. At that time Singer possessed a folder containing freight invoices later shown to be for marijuana shipments. On the folder was written an address of a Minneapolis warehouse where marijuana later was found. Additional invoices were found in Singer's billfold. Notes of earlier marijuana shipments, bookkeeping entries, and the names of co-conspirators were found written in Singer's personal calendar book. Two unindicted co-conspirators who entered plea

agreements testified that they had met Singer in connection with the conspiracy and had been directed by him by phone to pick up marijuana shipments from Miami at an air freight office in Minneapolis. Testimony also was offered and sales receipts produced showing that Singer had purchased baling tools, used to package marijuana for shipment.

Singer produced evidence that, as a lawyer, he had done legitimate legal work for his co-conspirators, and that he had been drawn unwittingly by them into the conspiracy. Gilbert Singer did not testify.

After an eight-day trial, the jury returned a verdict of guilty. Singer was sentenced to two consecutive terms of five years' imprisonment, a total of ten years. This appeal followed.

**Issues**

Singer challenges his conviction on five grounds. He argues that the indictment against him should be dismissed because the government's procurement and review of the confidential attorney-client file resulted in a denial of his sixth amendment right to effective assistance of counsel that Judge Eisele's remedial order failed to cure. He further asserts that the government officials' statements to the press suggesting that Meshbesher had knowingly obtained perjured testimony from Gilbert Singer disrupted the attorney-client relationship and forced Meshbesher's withdrawal, thus denying Singer his sixth amendment right to effective representation by his counsel of choice. In addition, Singer argues that the fifth amendment double jeopardy protection should

have barred his retrial because his first conviction was reversed as a result of judicial misconduct which, subsequent proceedings revealed, was driven by an intent to prejudice his defense. He also contends that the court violated his sixth amendment right to confrontation by refusing to strike Stoll's testimony after he invoked the fifth amendment privilege against self-incrimination in response to cross-examination. Finally, Singer urges this court, because of the various demonstrated acts of repeated governmental misconduct, to exercise its supervisory authority over the administration of criminal justice, to dismiss the indictment.

I.

Singer argues that the indictment against him should be dismissed because the government's procurement and review of

the confidential attorney-client file resulted in a denial of his sixth amendment right to effective assistance of counsel that Judge Eisele's remedial order failed to cure.

To establish a sixth amendment violation, a criminal defendant must show two things: first, that the government knowingly intruded into the attorney-client relationship; and second, that the intrusion demonstrably prejudiced the defendant, Weatherford v. Bursey, 429 U.S. 545 (1976); United States v. Davis, 646 F.2d 1298, 1303 (8th Cir.), cert. denied, 454 U.S. 868 (1981), or created a substantial threat of prejudice. See United States v.

Morrison, 449 U.S. at 366.[7] Identification of a sixth amendment violation alone, however, does not require dismissal of the indictment. The interests supporting the sixth amendment right, meant to assure fairness in the adversary criminal process, see, Gideon v. Wainwright, 372 U.S. 335, 344 (1963), must be reconciled with society's competing interest in prosecuting criminal conduct. In United States v. Morrison, the Supreme Court held that despite the government's deliberate viola-

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[7]Singer urges that we apply the standard set out in United States v. Davis, 646 at 1303 n. 8, where we commented, "It is certainly true that where there is gross misconduct on the part of the government no prejudice need be shown." Judge Eisele specifically found that Schermer in good faith concluded that government receipt of the file from Stoll was not improper. There has been no showing that this finding is clearly erroneous. United States v. Callery, 774 F.2d 1456 (9th Cir. 1985) (district court's determination as to good faith was a finding of fact not to be set aside unless clearly erroneous). Nevertheless, Singer's application of Davis really is beside the point, since Judge Eisele concluded that the sixth amendment in fact had been violated.

tion of defendant's sixth amendment rights, by disparaging her choice of counsel and by attempting to induce her to cooperate in the absence of counsel, the district court erred in dismissing the indictment. Rather, the appropriate course when faced with a sixth amendment violation is to tailor a remedy to the injury suffered, to assure the defendant effective assistance of counsel in a subsequent proceeding. Accord United States v. Soloman, 679 F.2d 1246 (8th Cir. 1982).[8]

Judge Eisele found that a sixth amendment violation had occurred because the

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[8]The National Association of Criminal Defense Lawyers, in its brief as Amicus Curiae, argues that an exclusionary remedy is inadequate to protect a defendant after a violation of the sixth amendment right to effective assistance of counsel. Amicus presses that we adopt a rule that a sixth amendment violation should result in automatic dismissal of the indictment. Such a rule, obviously, is untenable after United States v. Morrison.

government's procurement and review of the attorney-client file threatened to create prejudice at retrial. The question presented, then, is whether his remedial order was effective in eliminating upon defendant's retrial any "demonstrable prejudice, or substantial threat thereof." Morrison, 449 U.S. at 366.

Singer contends that Judge Eisele's order was flawed principally by its failure to bar Johnson and Stoll from testifying at retrial after they had seen the privileged documents. He points particularly to their review of Meshbesher's "witness list," a document listing 24 proposed witnesses with capsule summaries of their proposed testimonies. Appellant's Addendum at 29-30. Only three on the list had testified at the first trial, but 14 were called at retrial. Such review enabled Johnson and Stoll to anticipate defense

witness testimony, he asserts. "It is not possible to purge their minds." Appellant's Brief at 38.

Singer, however, fails to specify any testimony that reflects familiarity with the file. While full disqualification of Johnson and Stoll from any participation was an option open to the district judge, we do not believe that this extraordinary measure was necessary to remove the threat of prejudice resulting from the sixth amendment violation. Thus, we are unable to conclude that Judge Eisele's remedial order failed to satisfy the standard set out in Morrison. Nor do we believe that on retrial the taint of the earlier sixth amendment deprivation actually persisted. We have studied the record of both trials and are unable to conclude that the retrial testimony of either Johnson or Stoll was influenced by their study of the confi-

dential file so as to result in the defendant's suffering demonstrable prejudice.

Johnson first testified regarding his arrest of an indicted co-conspirator, who was found at a Minneapolis air freight office awaiting the arrival of a marijuana shipment that, a comparison of shipping invoices demonstrated, Singer had attempted to send from Miami. He also described the subsequent seizure of marijuana in a Minneapolis warehouse, detailing the packaging and condition of the contraband. Finally, Johnson testified to his analysis of telephone toll records, which demonstrated that numerous telephone calls had been placed from Singer's residence and Stoll's office in Miami to the residence of an admitted co-conspirator in Minneapolis. Johnson's testimony at the second trial was considerably less comprehensive than at the first trial. Nothing that

hadn't previously been stated was added. We are thus unable to discern any way in which Johnson's retrial testimony may have been shaped by his review of the confidential file.

We similarly are unable to discern how Stoll's review of the file may have influenced his testimony. On direct examination, Stoll testified to his long-lived association with Singer and to the origins of the conspiracy to distribute marijuana. He testified that during the period from July 1977 to early 1978, marijuana regularly was shipped from Miami to Minneapolis. At first, the marijuana was shipped, accompanied by Stoll and Singer, by commercial passenger plane. As the enterprise developed, the marijuana was shipped by air freight, with Stoll and Singer travelling to Minneapolis one to three times weekly to collect and convey the proceeds, which

Stoll testified ranged from $50,000 to $200,000 per trip. It is apparent that this testimony emanates not from review of the file, but from experience.

The government offered additional testimony and documentary evidence which substantially corroborated Singer's role in the conspiracy. Singer was arrested at a Miami air freight office in possession of several hundred pounds of marijuana. At that time he possessed numerous documents tying him to the conspiracy. In addition, other co-conspirators testified as to Singer's involvement.

We therefore are not convinced that Johnson and Stoll's review of the confidential attorney-client file influenced their testimony. Singer had failed to point us to any specific statement or area of testimony which reflects knowledge of the file.

Our study of the record reveals none. Furthermore, it is doubtful, in light of Stoll's inculpatory admissions, that the jury placed significant weight on his testimony.[9] Finally, even if we were to completely discount the testimony of Johnson and Stoll, we believe the record makes plain that the government produced substantial additional evidence for a jury to reasonably find that Singer had indeed

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[9]Stoll admitted to his personal animosity toward Singer. He admitted that he had been a fugitive following his arrest, that he had used aliases and failed to file tax returns. He admitted that he had pleaded guilty and agreed to cooperate and to testify to avoid exposure to a longer potential prison sentence. He also admitted to having committed numerous other crimes.

committed the crimes with which he was charged.[10]

Singer alleges other ways in which he was prejudiced by the government's procurement of the confidential file. He complains that information from the documents had been communicated to numerous persons, including the United States Attorney and numerous police officials. Accepting for argument sake this assertion as true, we fail to see how such officials' knowledge resulted in prejudice to Singer. In order to comply with Judge Eisele's order, none of these officials participated in the retrial. North Dakota prosecutors previously uninvolved were assigned to the case.

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[10]Singer also complains that Michael Strauss, an officer in the Minneapolis Police Force who reviewed the file, also should have been barred from testifying. Our review of the record convinces us that this testimony was not tainted by a study of the file. In addition, we observe that Strauss' testimony concerned the Minneapolis-based conspirators, and did not directly implicate Singer.

Johnson was replaced as case agent. There is no evidence either that Singer identifies or that we can find, that anyone, including Johnson or Stoll, ever communicated anything learned from review of the documents, let alone evidence that such communications caused prejudice. Singer's contention rests on unsupported speculation, and we therefore must reject it. We similarly dispose of Singer's complaint that Judge Murphy's review of the documents may have affected her rulings.

Singer finally charges that he was prejudiced because the government's examination of the documents and the subsequent suggestions of perjury and subornation of perjury prevented Gilbert Singer from testifying and resulted in Meshbesher's withdrawal as trial counsel. These assertions are without merit. As to Gilbert Singer, baseless accusations, as they are charac-

terized by Singer, logically pose no threat to truthful testimony. As to the attorney withdrawal, Judge Eisele properly concluded that Meshbesher's continued representation of Singer was not untenable. Furthermore, even if government officials' statements to the press did create in Meshbesher a conflict of interest requiring withdrawal, there is no claim that Singer's appointed counsel rendered ineffective assistance.[11] We thus reject these arguments.

We therefore conclude that Judge Eisele's remedial order was not inadequate to shield Singer from prejudice resulting from the government's intrusion into the Meshbesher file, and that Singer was not

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[11]Singer also claims that the government's possession of the file adversely affected his ability to bargain for a plea. Not even a germ of this argument finds root in the record, and we therefore need not address it. Singleton v. Wulff, 428 U.S. 106, 121 (1976).

denied effective assistance of counsel as guaranteed by the sixth amendment. By so concluding, we do not condone the conduct of Schermer and Johnson, who, on the basis of claims by an interested party indiscriminately sought out documents of suspect origin that they knew to be privileged.[12] We conclude only that Judge Eisele's carefully shaped remedial order was not inadequate under the standard set out by the Supreme Court in United States v. Morrison, 449 U.S. 361, to restore Singer's sixth amendment protections.

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[12]The defendant invites us to examine whether an intrusion into the attorney-client relationship violative of the sixth amendment would have resulted even if the government had taken appropriate precaution and obtained only those documents which provided evidence of Gilbert Singer's perjury. Judge Eisele's conclusion that Johnson and Schermer violated Singer's constitutional rights makes such examination unnecessary. However, we do emphasize that the government in this case clearly failed to exercise the caution necessary to protect plainly privileged documents which were immaterial to the commission of any crime.

## II.

Singer contends that the indictment should be dismissed because government officials' statements to the press suggesting that Gilbert Singer had committed perjury and Meshbesher had suborned perjury disrupted the attorney-client relationship and forced Meshbesher to withdraw, thus denying Singer his sixth amendment right to effective representation by his counsel of choice.

Judge Eisele found that law enforcement officials involved in prosecuting Singer leaked unproven assertions to the press, which potentially compromised Meshbesher's effectiveness as an advocate. He concluded that even though these statements were made without intent to interfere with the Meshbesher-Singer attorney-client relationship, they nonetheless

were improper, and threatened to prejudice Singer, resulting in a sixth amendment violation.[13] We do not hesitate to add that Judge Lord's statements to the press, and his letter to Judge Murphy, also violated well-recognized ethical standards and in addition, created the potential for substantial prejudice to defendant.

We repeatedly have recognized that a defendant's sixth amendment right to his counsel of choice should be protected. United States v. Agosto, 675 F.2d 965, 969 (8th Cir.), cert. denied, 459 U.S. 834 (1982); United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), cert. denied,

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[13]Judge Eisele further observed, after reviewing the confidential documents: "It is clear now, after the fact, that very few, if any, of those file documents constitute actual evidence of perjury." Appellant's Addendum at 74. At the time this case was submitted, the government still had not initiated prosecution against either Gilbert Singer or Meshbesher on the charges of perjury or subornation of perjury.

439 U.S. 1075 (1979). The question, however, is whether this independent sixth amendment violation necessitated imposition of the drastic remedy of dismissal of the indictment. Judge Eisele, again relying on United States v. Morrison, 449 U.S. 361, found that either the passage of time or the shifting of the trial to a different locale would serve to dissipate any derogation to Meshbesher's integrity resulting from governmental impropriety. There has been no showing that this finding is clearly erroneous. See United States v. Costanzo, 740 F.2d 251, 254-55 (3d Cir. 1984), cert. denied, 105 S. Ct. 3477 (1985) (district court's finding that no prejudice would flow from an alleged sixth amendment violation is reviewable under the clearly erroneous standard). Judge Eisele then permitted Singer to move for a continuance or a change of venue. In so doing, Judge Eisele tailored a rem-

edy to avoid prejudice and to remove the taint of the violation. Thus, despite the sixth amendment violation, Meshbesher was not forced to withdraw as trial counsel.[14]

III.

This court, after Singer's first trial, concluded that Judge Lord's misconduct had resulted in an unfair trial. United States v. Singer, 687 F.2d 1135 (8th Cir. 1982), rev'd on rehearing en

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[14]Singer argues that when the government impermissibly interferes with defendant's right to counsel of his choice, a defendant does not have to demonstrate actual prejudice to establish a sixth amendment violation. See, e.g., Linton v. Perini, 656 F.2d 207 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). This argument falters on two grounds. First, Judge Eisele found that a sixth amendment violation had occurred. Thus, we need not resort to the Linton analysis. Second, and perhaps more telling, in Linton, the court did not dismiss the indictment as a result of the sixth amendment violation, but reversed the conviction and remanded for a new trial. Id. at 212.

banc, 710 F.2d 431 (1983). We therefore ordered a new trial. We did observe, however, that the trial presented "by no means a case of actual bias on the part of the trial judge." Id. at 432. Singer now charges that when viewed through the lens of the subsequent misconduct, it is clear that Judge Lord's improprieties at trial indeed were motivated by a desire to prejudice Singer's prospects for acquittal. Such purposeful misconduct, he argues, should have operated to bar his retrial as violative of the prohibition against double jeopardy.

The double jeopardy clause of the fifth amendment protects a criminal defendant from repeated prosecution for the same offense. Oregon v. Kennedy, 456 U.S. 667, 671 (1982). The many purposes advanced by the double jeopardy prohibition are best expressed by Justice Harlan's

conclusion in United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion), that the clause promotes the criminal defendant's general interest in being able, "once and for all, to conclude his confrontation with society." Thus, once a trial reaches a verdict, whether of conviction or acquittal, reprosecution is barred. United States v. Scott, 437 U.S. 82, 91 (1978). Of course, if the trial ends in a verdict of guilty, but is reversed on appeal, the government may reinitiate prosecution. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceeding leading to conviction." United States v. Tateo, 377 U.S. 463, 465-66 (1964). The only established exception to this rule is where reversal of the conviction is grounded on insufficiency of the evidence,

United States v. DiFrancesco, 449 U.S. 117, 130-31 (1980), since this ruling is equivalent to a directed verdict of acquittal at trial. Burks v. United States, 437 U.S. 1, 16-17 (1978).

Where no verdict is reached, but the trial ends in mistrial, the double jeopardy clause also ordinarily does not preclude retrial. See, e.g., Wade v. Hunter, 336 U.S. 684, 689 (1949) (retrial after hung jury does not implicate double jeopardy concerns). There is a narrow exception to this rule, however, when the defendant moves for and is granted a mistrial on the basis of deliberate prosecutorial or judicial misconduct.[15] To permit retrial in such a circumstance offends the interests

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[15]What level of intent must motivate the misconduct to implicate double jeopardy interests, and whether the requisite intent level is the same for both prosecutorial and judicial misconduct are questions not yet definitively answered. See post at 23-24.

supporting the double jeopardy bar because the misconduct compelled the defendant to forego his right to a fair trial leading to verdict before the first tribunal. United States v. Dinitz, 424 U.S. 600, 609-10 (1976); United States v. Jorn, 400 U.S. at 485.

At his first trial, Singer moved for a mistrial based on judicial misconduct. The motion was denied and a conviction followed. Subsequently, the conviction was overturned because of Judge Lord's misconduct at trial. We therefore face this question: Does the general rule advanced in DiFrancesco apply, that the double jeopardy bar does not foreclose reprosecution following appellate reversal of a conviction? Or does the narrow mistrial exception stated in Dinitz extend to a situation where the earlier prosecution proceeded over defendant's mistrial motion

for judicial misconduct to a verdict of conviction, only to be reversed on those same grounds?

While this issue has percolated in dicta through the several circuits,[16] it has yet to be addressed by the Supreme

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[16] See United States v. Head, 697 F.2d 1200, 1206 n. 10 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); Robinson v. Wade, 686 F.2d 298, 305-09 (5th Cir. 1982); United States v. Curtis, 683 F.2d 769, 772-76 (3d Cir.), cert. denied, 459 U.S. 1018 (1982); United States v. Singleterry, 683 F.2d 122, 123-24 (5th Cir.), cert. denied, 459 U.S. 1021 (1982); United States v. Roberts, 640 F.2d 225, 227-28, 230-31 (9th Cir.) (Norris, J., dissenting), cert. denied, 452 U.S. 942 (1981); United States v. Rios, 637 F.2d 728, 729 (10th Cir. 1980), cert. denied, 452 U.S. 918 (1981); United States v. Opager, 616 F.2d 231, 235-36 (5th Cir. 1980). See also Petrucelli v. Smith, 544 F.Supp. 627, 632-40 (W.D.N.Y. 1982), aff'd sub nom, Petrocelli v. Coombe, 735 F.2d 684 (2d Cir. 1984); Alicea v. Kuhlman, 537 F.Supp. 1156, 1158-59 (S.D.N.Y. 1982).

Court.[17] To this circuit it is one of first impression.

There is good reason to argue that a criminal defendant whose conviction over a timely motion for mistrial is reversed because of any sort of governmental misconduct should be placed on equal footing with a defendant whose motion properly is granted. The defendant obtains mistrial only if the trial judge apprehends the sufficiently prejudicial misconduct. In reversing, the appellate court simply corrects the trial court's error. The right of a criminal defendant not to be twice

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[17]All Supreme Court cases considering the preclusive effect of prosecutorial or judicial misconduct emerged from situations in which a verdict had not been obtained. See Oregon v. Kennedy, 456 U.S. 667 (mistrial); Lee v. United States, 432 U.S. 23 (1977) (dismissed on defective information); United States v. Dinitz, 424 U.S. 600 (mistrial); United States v. Jorn, 400 U.S. 470 (mistrial); United States v. Tateo, 377 U.S. 463 (guilty plea); Downum v. United States, 372 U.S. 734 (1963) (mistrial); Gori v. United States, 367 U.S. 364 (1961) (mistrial).

placed in jeopardy should not hang on which court correctly determines that misconduct infected the trial. See Robinson v. Wade, 686 F.2d at 307-08; United States v. Curtis, 683 F.2d at 774. As the Supreme Court stated in United States v. Burks, 437 U.S. 1, when explaining why double jeopardy concerns preclude retrial upon reversal for insufficient evidence, "[T]o hold otherwise would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." Id. at 11.

But there is a danger in drawing too much from Burks' grudging exception. Indeed, in Burks itself, the Court stated that governmental misconduct was not among the grounds for reversal that implicated the double jeopardy clause. Id. at 15. And as the Court added in Oregon v. Ken-

nedy, 456 U.S. 667: "This Court has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of insufficiency of the evidence." Id. at 677 n. 6 (citation omitted).[18] If the bedrock interest supporting the double jeopardy prohibition is protection of the defendant's "valued right" to have a verdict rendered by the first jury, Oregon v. Kennedy, 456 U.S. at 674; Wade v. Hunter, 336 U.S. at 689, then the dangers which the prohibition seeks to avoid are more attenuated when the first trial goes to verdict, since the defendant has not lost his

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[18]The narrowness of this exception is highlighted by the Court's holding in Tibbs v. Florida, 457 U.S. 31 (1982), that retrial is permitted after a state appellate court's reversal of a conviction that, while sufficient to support the jury verdict, was against the weight of the evidence.

chance for acquittal by the first jury._ United States v. Singleterry, 683 F.2d at 124. Thus it can persuasively be argued that the double jeopardy clause should not be read to impose the drastic remedy of dismissal of the indictment following reversal of a conviction on the basis of misconduct.

Like other courts, we recognize that this is a complicated and close question. See, e.g., United States v. Curtis, 683 F.2d at 772. Its resolution, however, is not necessary to this appeal. Although we do not condone Judge Lord's behavior, we do not believe it manifests the intent required to implicate double jeopardy concerns.

In United States v. Dinitz, 424 U.S. 600 (1976), the Supreme Court considered when the double jeopardy clause would bar

reprosecution after dismissal due to judicial misconduct and the double jeopardy clause. In Dinitz, the defendant made an unopposed motion for a mistrial after the trial judge expelled his attorney from the courtroom for impropriety in his opening statement. The defendant was retried and convicted. The Supreme Court rejected the argument that retrial was barred by the double jeopardy clause. The Court admitted that the judge's action was improper, but reasoned that it did not reflect the intent level necessary to bar retrial. "[It] was not done in bad faith in order to goad the respondent into requesting a mistrial or to prejudice his prospects for an acquittal." Id. at 612. In so holding the court echoed the standard established in United States v. Jorn, 400 U.S. 470 (1970) (plurality opinion), which also involved judicial misconduct.

The Court has since refined this standard. In Oregon v. Kennedy, 456 U.S. 667 (1982), involving prosecutorial misconduct, the Court held that double jeopardy interests attach only when "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." Id. at 680. In announcing this narrower standard, the Court explicitly rejected the "bad faith" and "prejudice" language it earlier had offered. Id. The court, however, did not make clear whether the new standard applies to judicial as well as prosecutorial misconduct. Kennedy involved only prosecutorial misconduct. Moreover, the rationale the court employed, that "Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt," Id. at 675,

would seem anomalous in the context of judicial misconduct. Every act on the part of the trial judge, obviously, is designed not to prejudice the defendant, but to ensure fairness. See Rochin v. California, 342 U.S. 165, 171-72 (1952). On the other hand, the Court's frequent reference to Dinitz and Jorn, and its repeated mention, as if in one breath, to prosecutorial and judicial misconduct -- both appear in the paragraph immediately preceeding the Court's statement of its holding--leave a question as to the intended scope of Kennedy.

Regardless of which standard should apply, we do not believe this is a case that implicates double jeopardy concerns. Judge Lord's misconduct at the first trial was sufficiently objectionable to require reversal of the conviction. But even when colored by his post-trial misconduct , it

does not evince the bad faith or design to prejudice the defendant's prospects for acquittal that the Court asserted even in Dinitz and Jorn are prerequisite to invocation of the double jeopardy bar. As we stated in our decision after en banc review,

> On the whole, it seems clear to us that the court believed the evidence of the defendants' guilt was strong, but that the case was a complicated one, and that justice might not be done if government counsel were left to his own devices.

United States v. Singer, 710 F.2d at 436. We are not persuaded to move from our en banc conclusion that Judge Lord's conduct at trial, while improper, did not demonstrate "actual bias." Id. at 432.

Singer points to three acts which he argues illuminate Judge Lord's motives at trial: first, his ex parte meeting with Assistant United States Attorney Schermer in April, 1981, between the time of Sing-

er's conviction and his filing of post-trial motions, where he expressed his concern over the adequacy of the trial record; second, his statements to the press on July 23, 1983, after this court's en banc reversal of defendant's conviction and on September 16, 1983, after it was revealed that the United States Attorney possessed the confidential attorney-client documents; and third, his letter to Judge Murphy on September 20, 1983, criticizing Meshbesher and offering to testify. These acts have been roundly condemned by Judge Eisele and we join in his condemnation. However, we do not believe that they speak with any certainty to Judge Lord's motives during trial.

First, all of the demonstrated improprieties were committed after the jury returned its conviction. The episodes involving the press statements and the

letter to Judge Murphy occurred several years after the trial. We do not think it possible to divine by acts so distant in time any motive for the relevant trial misconduct. Second, even if we could, we believe these acts demonstrate nothing more than Judge Lord's concern that the conviction, which he clearly believed served the ends of justice, not be reversed. While we have doubt that Judge Lord overstepped the ethical bounds in pursuit of this end, we do not believe it evinces a bad faith motive.

We therefore conclude that Judge Lord's misconduct at trial was not driven by the kind of motive that would allow invocation of the double jeopardy prohibition. Under the circumstances of this case, retrial was the proper course.

IV.

Singer contends that on retrial the court violated his sixth amendment right to confrontation by permitting government witness Stoll to invoke the fifth amendment privilege against self-incrimination, and by refusing to strike his entire testimony once the privilege had been invoked. Stoll claimed the privilege during cross-examination regarding his acquisition of the confidential attorney-client file.

At the outset, we observe that Stoll repeatedly, explicitly, and successfully asserted his fifth amendment right during his testimony at the Eisele hearings and at retrial before Judge Murphy. The question then arises whether Stoll, by his testimony at the hearings, implicitly waived the privilege. In Klein v. Harris, 667 F.2d 274 (2d Cir. 1981), the Second Circuit articulated a useful test to determine whether a witness has waived the

fifth amendment privilege. Under this analysis, a trial or reviewing court must infer waiver from a witness' prior statements if:

> (1) the witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth, and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the fifth amendment's privilege against self-incrimination.

Id. at 287. We believe that neither part of this test is satisfied.

Stoll's statements on retrial created no significant likelihood that the jury would be left with a distorted view of the truth. On the contrary, his testimony was fairly corroborated by the testimony of the unindicted co-conspirators and the police officers, and by the substantial documentary and physical evidence. Stoll also could not reasonably have believed that his prior testimony would be viewed as a

waiver. While Stoll did testify at in camera hearings before Judge Eisele regarding his acquisition of the confidential file, he successfully asserted the privilege when questioned about how the documents actually had been removed from Meshbesher's office. The possibility of prosecution for burglary or theft, of course, still existed. To withdraw the grant of privilege upon similar inquiries at trial would do violence to Stoll's reasonable expectation that it would be respected. Judge Murphy determined that the privilege had not been waived. She did not err in this conclusion.

Although Stoll's invocation of the fifth amendment privilege prevented Singer from cross-examining him regarding his knowledge of how the file was taken from Meshbesher's office, Singer's sixth amendment right to confrontation was not abro-

gated when the court refused to strike Stoll's entire testimony.

The right to confrontation includes the right to cross-examine adverse witnesses. Pointer v. Texas, 380 U.S. 400, 404 (1965). When a conflict of rights arises between a witness' fifth amendment privilege against self-incrimination and the defendant's sixth amendment right to confrontation, a balance must be struck. Ellis v. Black, 732 F.2d 650, 656 (8th Cir. 1984); United States v. Gould, 536 F.2d 216, 222 (8th Cir. 1976). If the subject upon which the witness refuses to testify relates to matters elicited by the government on direct examination and the defendant's counsel is prejudicially impaired in his ability to assail the truthfulness of the direct testimony, the court should strike at least the relevant portion of the testimony. United States v.

Humphrey, 696 F.2d 72, 75 (8th Cir. 1982), cert. denied, 459 U.S. 1222 (1983). On the other hand, if the witness' invocation of the privilege prevents the defendant's inquiry into merely collateral matters, such as credibility, the defendant has suffered no prejudice and the witness' other testimony need not be stricken. Ellis v. Black, 732 F.2d at 656; United States v. Brierly, 501 F.2d 1024, 1027 (8th Cir.), cert. denied, 419 U.S. 1052 (1974). This balancing includes the effectiveness of the cross-examination as a whole. Thus, if the defendant has available effective alternative means of exploring relevant matters on cross-examination, sixth amendment rights remain intact. Ellis v. Black, 732 F.2d at 650.

Singer asserts here, as he did at retrial, that his attempt to cross-examine Stoll regarding his acquisition of the

file was driven by two purposes. First, Singer sought to establish that the witness had stolen the file so that he could negotiate a favorable plea bargain with the government. Judge Eisele, however, found specifically after an evidentiary hearing that the file was removed from Meshbesher's office by someone other than Stoll. In addition, inquiry into the circumstances and terms of Stoll's plea agreement goes to Stoll's credibility, and therefore is a collateral issue. Singer had adequate opportunity to attack Stoll's credibility, and indeed, as amply demonstrated by the record, elicited substantial impeachment evidence. Second, Singer sought to show that Stoll's direct testimony was influenced by his review of the documents. While this purpose does go to the reliability of Stoll's direct testimony, Singer's counsel was permitted to ask Stoll whether he had read the docu-

ments before testifying. Such permissible inquiry effectively provided Singer the means to pursue his purpose without endangering Stoll's fifth amendment protection.

The sixth amendment confrontation rights of a defendant are met when defense counsel is permitted to effectively challenge the truthfulness of the direct testimony and pursue impeachment of the witness so as to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. 308, 318 (1974). Judge Murphy properly reconciled the conflict of rights by permitting such inquiry while protecting the witness' fifth amendment privilege. Thus, there was no basis to strike Stoll's direct testimony.

Finally, Stoll's credibility was thoroughly impeached upon cross-examination. Moreover, the testimony of the remaining government witnesses and additional documentary and physical evidence introduced provided an overwhelming basis for the jury to return a conviction. Violations of the confrontation clause may, in the appropriate case, be declared harmless. Schneble v. Florida, 405 U.S. 427, 432 (1972); Harrington v. California, 395 U.S. 250, 254 (1969). If any error had been committed by Judge Murphy to prevent Singer from fully cross-examining Stoll and by refusing to strike Stoll's remaining testimony, it is harmless beyond a reasonable doubt under Fed. R. Crim. P. 52(a). See United States v. Hastings, 461 U.S. 499 (1982).

V.

Finally, Singer urges this court, because of the various demonstrated acts of government misconduct, to exercise its supervisory authority over the administration of criminal justice, to dismiss this indictment.

These proceedings have exposed acts of police, prosecutorial, and judicial misconduct and impropriety. Police and prosecutors have engaged in ex parte meetings with Judge Lord. The Minneapolis Chief of Police offered unproven accusations to the press. The office of the United States Attorney sought, obtained, and reviewed privileged documents unrelated to the discovery of evidence of other crimes. We condemn these actions. The Supreme Court warned in Berger v. United States, 295 U.S. 78 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy,

> but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, ***. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88. These principles apply with equal force to the police.

Even more deeply distressing is Judge Lord's misconduct. He "assume[d] the mantle of an advocate" at trial, United States v. Singer, 710 F.2d at 438 (Lay, C.J., concurring), and initiated at least one ex parte meeting with the prosecutor to advise on how to avoid reversal of the conviction. These acts of misconduct already have been criticized. We reemphasize, such misconduct cannot be tolerated.

Judge Lord also made unproven and damaging statements to the press. We acknowledge that these comments may have been driven by an understandable concern that perjury had been committed in his courtroom. But Judge Lord had at his disposal acceptable procedures to address the perceived violation. Trial by press undermines the delicate processes carefully crafted to do justice. Judge Lord also wrote to a fellow judge on a pending action. A letter to a fellow juror creates at minimum substantial appearance of impropriety.

Judge Lord's misconduct at trial and afterward caused one reversal in this case and created a serious possibility of reversal in this second appeal. The public should not be made to suffer these assaults. The weight of the criminal justice system rests on our respect for process and disregard of outcome. The trial

judge is the cornerstone of this system; he must double-shoulder the weight, not with action but with sound restraint. He must strain to preside with self-disciplined impartiality to achieve a just verdict. To this cause Judge Lord shrugged, and let the weight fall.

But we cannot say that the weight fell on Mark Singer. He has had two trials, three appeals, and numerous ancillary hearings. He has been twice convicted, and twice sentenced to 10-year terms. And yet, although it has been nearly eight years since his arrest, our system, despite its failings in this case, or perhaps because of them, has not required him to spend one night in prison. The evidence of Singer's guilt, however, is overwhelming. And while these proceedings have suffered much error, the error, as it pertains to Singer's conviction of guilt, is

harmless beyond a reasonable doubt. The Supreme Court has admonished the courts of appeals to refrain from exercise of our supervisory authority over the administration of criminal justice when the error is harmless. United States v. Hastings, 461 U.S. 499 (1982). We therefore follow that directive, and reject Singer's request to dismiss the indictment.

We affirm the judgment of conviction.

BRIGHT, Circuit Judge, dissenting.

I respectfully dissent.

The majority today agrees with Judge Eisele's ruling that the Government's conduct violated Mark Lewis Singer's sixth amendment right to be represented by counsel of his choice and upholds Judge Eisele's remedy for that violation. The ma-

jority concludes that by permitting Singer to move for a continuance or a change of venue, Judge Eisele fashioned a remedy which enabled Ronald Meshbesher to remain as Singer's trial counsel, thereby removing the prejudice to Singer and effectively curing the sixth amendment violation. I disagree. Against the background of the Government's highly improper conduct, Meshbesher had no choice except to withdraw. In my opinion Judge Eisele's order did not serve as a curative for the government's conduct. Under the circumstances of this case, I believe that the proper remedy is dismissal of Singer's indictment.[19]

I.

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[19]Because I believe that under the circumstances of this case the government's violation of Singer's sixth amendment right to counsel requires dismissal of his indictment, I do not reach the other issues raised on appeal.

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defense." This right is "indispensable to the fair administration of our adversarial system of justice" and "safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." Maine v. Moulton, 106 S. Ct. 477, 483-84 (footnote omitted).[20] It has long been recognized that the sixth amendment's broad guarantee of counsel includes the right to be represented by counsel of one's choice. Glasser v. United States, 315 U.S. 60, 70

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[20]In Maine v. Moulton, 106 S. Ct. 477, 485 (1985), the Supreme Court said that "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." This is exactly what occurred in the present case.

(1942); United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982).[21]

The Supreme Court has indicated that to establish a sixth amendment violation a criminal defendant must show that the government knowingly intruded into the attorney-client relationship, and that the intrusion created a "realistic possibility" of prejudice to the defendant or "benefit" to the prosecution. United States v. Morrison, 449 :U.S. 361, 365 (1981); Weatherford v. Bursey, 429 U.S. 545, 558 (1977). See also United States v. Mastroianni, 749 F.2d 900, 907 (1st Cir. 1984); United States v. Davis, 646 F.2d 1298, 1303 (8th Cir.), cert. denied, 454 U.S. 868 (1981).

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[21]It is of course true that the sixth amendment right to be represented by counsel of one's choice is not absolute. United States v. Agosto, 675 F.2d 965, 970 n. 4 (8th Cir. 1982). See also United States v. Rankin, 779 F.2d 956, 958 (3d Cir. 1986). This is not the type of case, however, in which the extent of that right should be circumscribed.

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As the majority notes, the establishment of a sixth amendment violation alone, however, does not require dismissal of a criminal defendant's indictment. See Majority Opinion at 11-12.

In United States v. Morrison, 449 U.S. 361, 365 (1981), the Supreme Court held that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment" is not a proper remedy for the violation of a criminal defendant's sixth amendment rights.[22] The

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[22]It is important to note that in Morrison the Supreme Court did not create a per se rule against the dismissal of a defendant's indictment for a violation of his sixth amendment rights. The court merely stated that there had to be an appropriate showing of prejudice to warrant dismissal of a defendant's indictment.

In Morrison the Court stated that no prejudice had been demonstrated and noted the record did "not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness." 449 U.S. at 365-66 n.2. I believe that the present case contains precisely the kind of actual preju-

Court stated that cases involving sixth amendment deprivations are subject to the rule that remedies should be tailored to the injuries suffered from the constitutional violation. Id. at 364. See also United States v. Solomon, 679 F.2d 1246, 1250-51 (8th Cir. 1982).

II.

In the present case Judge Eisele found that law enforcement officials charged with prosecuting Singer made improper, unproven allegations that Meshbesher had suborned perjury. He concluded that these statements interfered with the attorney-client relationship between Meshbesher and Singer and threatened to prejudice Singer, thereby resulting in a sixth amendment violation. The question then

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dice and recurring violations that require dismissal of Singer's indictment.

becomes what is the appropriate remedy for this violation.

Judge Eisele found, in the majority's words, "that either the passage of time or the shifting of the trial to a different locale would serve to dissipate any derogation to Meshbesher's integrity resulting from governmental impropriety." Therefore, relying on Morrison, Judge Eisele permitted Singer to move for a continuance or a change of venue. The majority approves of Judge Eisele's findings and upholds his remedy, concluding that it allows Meshbesher to remain as Singer's trial counsel and therefore removes the taint of the sixth amendment violation. I disagree.

The "governmental impropriety" did more than simply disparage "Meshbesher's integrity." I believe that the allega-

tions made by Government officers that Meshbesher suborned perjury, and the prosecutors' veiled threats of prosecution, disrupted Meshbesher's ability to zealously represent Singer, and created a situation in which the taint placed on Meshbesher by the Government's conduct might wash off on Singer in a trial in which Meshbesher was trial counsel. Meshbesher, therefore, was forced to withdraw and Singer was injured by losing the services of his counsel of choice. Under Morrison, I believe that this is "demonstrable prejudice" which justifies dismissal of Singer's indictment. I would therefore reverse.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5156-MN

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| United States of America, | * | |
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| Appellee, | * | |
| | * | |
| vs. | * | Appeal from the |
| | * | United States |
| Mark Lewis Singer, | * | District Court |
| | * | for the Dis- |
| Appellant. | * | trict of Minne- |
| | * | sota |

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judges Lay, Heaney and Arnold would have granted the petition.

Petition for rehearing by the panel is also denied.

May 20, 1986

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1654

United States of America,

Appellee,

v.

Mark Lewis Singer,

Appellant.

No. 81-1673

United States of America,

Appellee,

v.

Oakley Bechtel Cline, III,

Appellant.

Appeals from the United States District Court for the District of Minnesota

No. 81-1677

United States of America,

Appellee,

v.

Joseph Michael Sazenski,

Appellant.

No. 81-1678

United States of America,

Appellee,

v.

Arturo Izquierdo,

Appellant.

No. 81-1679

United States of America,

Appellee,

v.

John Patrick Reynolds,

Appellant.

*

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Submitted: January 13, 1983

Decided: June 20, 1983

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Before LAY, Chief Judge, HEANEY, BRIGHT and ROSS, Circuit Judges, HENLEY, Senior Circuit Judge, and McMILLIAN, ARNOLD, JOHN R. GIBSON and FAGG, Circuit Judges, en banc.

ARNOLD, Circuit Judge.

Defendants Mark Lewis Singer, Oakley Bechtel Cline, III, Arturo Izquierdo, Joseph Michael Sazenski, and John Patrick Reynolds appeal from their convictions on a number of drug-related offenses. The principal question presented is whether the District Court so far injected itself into the trial as to give the jury the impression that it favored the prosecution, thus depriving defendants of a fair trial. Although this is by no means a case of actual bias on the part of the trial judge, our review of the record constrains us to hold that his repeated

remarks in the presence of the jury, culminating in a reference to his "helping the Government to try its case," prevented the defendants from having their guilt or innocence determined in a proceeding free of a fatal appearance of unfairness. We therefore, in the exercise of our supervisory power over the administration of criminal justice in this Circuit, reverse the judgments of conviction and remand this case for a new trial.

I.

This case was originally submitted to a panel of this Court, and an opinion was filed affirming the convictions, one judge dissenting. United States v. Singer, 687 F.2d 1135 (8th Cir. 1982). We adopt the statement of facts contained in part I of the panel opinion. We also adopt parts III and IV of the panel opinion. Specifically, we agree with the panel that the grounds urged by appellants in support

of reversal (apart from the question of the District Court's conduct of the trial) are without merit. The panel's unanimous decision rejecting each of these grounds is adopted and reaffirmed.

II.

This case was tried before a jury from December 8,1980, to December 18, 1980. It was a complex multi-defendant trial, with each of the six[1] defendants who went to trial retaining his own lawyer. An Assistant United States Attorney tried the case on the government side alone. The District Court early became dissatisfied with the conduct of the government's case. On December 10, the third day of the trial, the court summoned the United States Attorney to a conference in chambers. The conference began as follows (Tr. 311):

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[1]The co-defendant Scott Cline was acquitted by the jury.

> THE COURT: You may recognize an array of faces as being the cream of the crop of the Criminal Bar of the State of Minnesota, most of them specializing in Federal practice.
>
> Yesterday I wrote a note which was delivered to Mr. Berg [the United States Attorney] which said I thought he ought to have a backup man for [the Assistant United States Attorney trying the case] in Court here. It's Christmastime, its the beginning of winter, its the flu time, and I thought we don't want this case delayed because we lost somebody.
>
> Now I could go on to give you some other reasons why I thought you should have a backup man. But can't you assign somebody up here this morning to start with us?

Mr. Berg declined. The District Court then ordered the United States to send another Assistant United States Attorney "to second-chair this man. That's an order. And we'll wait until he comes, before we go on with the case. . . . And if he is not here by noon, I will dismiss the case" (Tr. 312-13). The United States Attorney asked for a recess to consider the matter, following which the judge relented and agreed to allow the trial to proceed without additional counsel on the

prosecution side. The court warned that "I am not going to try the Government's case for it, like I've been doing up to this time" (Tr. 317)(emphasis ours).

The trial judge nevertheless continued to help government counsel in the presence of the jury. As the trial continued, the court helped the government again and again. The judge admonished the prosecutor:

> You've just about got that question so that its unintelligible because its about four questions in one.
> What do you want him to say?, did he look at the stuff coming back from Minnesota? (Tr. 1057).

He instructed him on when, how, and on what grounds to object.

> THE COURT: . . . [W]hat are you doing there?
> [GOVERNMENT COUNSEL]: Your Honor, I was just considering making an objection, objecting on the grounds of lack of relevance.
> THE COURT: Well, that's a good thought. You are still here, however, aren't you?
> [GOVERNMENT COUNSEL]: Yes, I am, Your Honor, I am objecting.

THE COURT: Have you thought any thing about repetitiveness?
[GOVERNMENT COUNSEL]: Your Honor, I object also on the grounds of repetitiveness.
THE COURT: All right. Now when you come to a specific question, you make the objection and let me rule on it.

The question has been asked and answered now, but you might be just a little more aggressive here--or we'll be here for a month (Tr. 630-31).

The judge was concerned that government counsel elicit testimony properly and avoid objections. "Just a minute. Lay a little more foundation than that. 'Was there a time when another person came?' That's the way you do that, you see?" (Tr. 677). He directed government counsel when to end questioning (Tr. 789), and, apparently exasperated over the inability of government counsel to examine a witness properly, he took over the questioning himself.

REDIRECT EXAMINATION

[BY GOVERNMENT COUNSEL]:
Q. You've described material you seized as marijuana?

MR. RESNICK: I will object to the reference to it as marijuana because it has not yet been identified as that.

THE COURT: Lay the foundation.

[GOVERNMENT COUNSEL]: Yes.

[GOVERNMENT COUNSEL]:

Q. Did you see some material --

THE COURT: Wait, wait.

Does he know marijuana from a bale of hay?

[GOVERNMENT COUNSEL]:

Q. Do you know what marijuana looks like?

A. Yes, I do.

MR. RESNICK: I object to that as lack of proper foundation.

THE COURT: How does he know?

[GOVERNMENT COUNSEL]:

Q. How do you know what marijuana looks like?

A. Because I've come in contact with marijuana on numerous occasions in the course of my duties with the Police Department.

* * * * * *

Q. Could you describe what the substance looked like that you seized?

THE COURT: Now, let's talk about what marijuana looks like.

[GOVERNMENT COUNSEL]:

Q. What does marijuana look like?

THE COURT: In a bale.

A. Marijuana in a bale--just like a hay bale, but its wrapped up, usually, in burlap, sometimes in plastic.

MR. RESNICK: I will object to the packaging. He asked what marijuana looks like, Your Honor. Not responsive to the question.

THE COURT: I think there is something to that. Let's look at the material. You know, if you saw a truck riding down the street and it had little windows in it, would you say there were horses in there?

A. Yes, I would, Your Honor.
THE COURT: You would?
Wouldn't it take a kind of a little smell to confirm that?
(Laughter.)
A. Yes, Your Honor.
THE COURT: What does marijuana look like, what does it smell like, what does it feel like?
If you know all of those things, we'll let you go on.
If you don't, we'll send you back to Florida.

* * * * * *

THE COURT: Ask him a question please.
I've given you a hint as to what you might ask him.
[GOVERNMENT COUNSEL]: Yes.
[BY GOVERNMENT COUNSEL]:
Q. Would you tell the members of the jury what marijuana looks like and smells like, just a physical description?
THE COURT: One question at a time.
[BY GOVERNMENT COUNSEL]:
Q. What does marijuana look like?
THE COURT: What color is it?
A. Sometimes its green, sometimes its gold, goldish-tan color, depending on where it comes from.
THE COURT: What is the texture of it? What do the little things look like?
A. It has the texture of a leaf. And the marijuana plant has five leaves on it.

* * * * * *

[GOVERNMENT COUNSEL]: Okay, I'll go on to the----
THE COURT: Does it have any seeds in it?
[BY GOVERNMENT COUNSEL]:
Q. Does it have seeds on it?
A. Yes, it does.

THE COURT: Do the leaves have any little pointees [sic] on them? (Tr. 648-53).

These examples are only illustrations. The trial court injected itself into the proceedings in a similar fashion on several other occasions. See, e.g., Tr. 677, 1014-15, 1057.

Matters came to a head on Monday, December 15, 1980, the sixth day of trial. That morning, government counsel of his own accord corrected a statement he had made earlier to the effect that Izquierdo's fingerprints had been found on a certain lease application. Counsel for Izquierdo moved for a mistrial.[2] The District Court (properly) found that the

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[2]This was not the first motion for mistrial. On December 9, 1980, the second day of testimony, a motion for mistrial was made on the ground that the court had explained a certain defense contention to the jury in such a way as to minimize or belittle it. Tr. 157. In all, 15 motions for mistrial were made during the course of the trial.

prosecutor's error had been unintentional. When Izquierdo's lawyer then attempted to press his motion, the court interrupted him (Tr. 974):

> THE COURT: Hey, there's one lawyer up here who I wanted them to get some help for, and they won't send him any.
> MR. RESNICK: Well, that's not my fault.
> THE COURT: And he's just about overwhelmed.
> Now, Jurors, there is no fingerprint of Mr. Izquierdo on that thing.
> Mr. Schermer made a mistake.
> So, I think you can put that out of your mind, can't you, Jurors?
> (Juror's nod their heads affirmatively.)
> THE COURT: The motion for mistrial is denied.
> The jury is to disregard that.
> It didn't happen.
> It was a mistake.

Later, that day, during a conference in chambers, the defense again moved for a mistrial, this time on the ground that, because of the court's remarks earlier that day, "they're [the jury] going to feel sorry for this guy [the Assistant United States Attorney], and as a result its going to redound to our prejudice" (tr. 1022-23). The court denied the motion, observing (Tr. 1025-26):

> I am not letting Schermer make mistakes. He's tried to make several of them, and I just must concede that I have straightened him out.
> And I asked U.S. Attorney Tom Berg to send somebody up here to help him, and Berg wouldn't do it.

But the statement I made to the jury about this man being overwhelmed was unfortunate--but I am going to straighten that out for you.

* * * * * *

And I will straighten them out on the one mistake which I made, which was to say that Schermer was overwhelmed; and -- even though its true -- I will straighten it out.

The jurors then returned to the courtroom, and the following took place (Tr. 1026-27):

THE COURT: Ladies and Gentlemen of the jury, I should tell you something.

I made a mistake,and it really probably isn't even factually true.

When Mr. Schermer made that mistake where he said the wrong fingerprints were on the exhibit -- he said the fingerprints were from a room that was rented over there, whereas in reality the fingerprints were in what he claims is a drug book -- do you remember that?

(The jurors nod affirmatively.)

THE COURT: -- that was a mistake he made.

I made a mistake, too, in trying to get this in perspective and set up so that you would understand it, and I said, "Well, Schermer's busy and he's overwhelmed."

Well, he is not overwhelmed.

He represents the Government; and if the Government can't send enough people up here to do their case right, then they deserve to lose if -- by so doing -- they don't get the evidence in and make mistakes and mess up the case.

So, don't go feeling sorry for Schermer. He's tried dozens of cases for the Federal Department of Justice, criminal income tax cases, he's tried narcotics cases, he's

done all kinds of things, and he has wonderful credentials.
Sometimes I make him do it my way, but don't go feeling sorry for him.
And I'm sorry I said that.
He is not overwhelmed.
He is a tiger.
Go ahead.

MR. SCHERMER: Thank you, Your Honor.

In context, the remark about counsel's being "a tiger" could not have been taken seriously.

A few minutes later, the court again interrupted the government counsel, this time to keep him from what would apparently have been a breach of an agreement about the proper scope of a witness's examination. The judge instructed counsel as to how to proceed, addressed the witness directly himself, and then stated to the jury: "Now I hope you don't object to my helping the Government to try its case, Ladies and Gentlemen, and Counsel . . . (Tr. 1029).

We have carefully studied the entire transcript of the trial, amounting to over 1,800 pages, and the passages we have quoted are a fair sampling. To be sure, every intervention by the trial court in the proceedings was not on the side of the government,and some of the comments that the court made may have been helpful to the defense. It is nevertheless true that most of the court's interventions were designed to clarify government testimony, to help government counsel, to indicate to government counsel when he should or should not make objections, to instruct government counsel on how to make his evidence more intelligible, to suggest to him when he should stop the examination of a witness, to indicate to him what he should write on a blackboard in order to illustrate a point to the jury, and the like. In addition, on numerous occasions the court took over the questioning of

government witnesses in order to make sure that the somewhat complicated facts of this case were clearly explained. On the whole, it seems clear to us that the court believed the evidence of the defendants' guilt was strong, but that the case was a complicated one, and that justice might not be done if government counsel were left to his own devices.

While it is a judge's privilege and duty to take an active part in the trial where necessary to clarify evidence and assist the jury, a judge must studiously assist the jury, a judge must studiously avoid one-sidedness. See Quiercia v. United States, 289 U.S. 466, 470, 53 S.Ct. 698, 699, 77 L.Ed. 1321 (1933). In the case at hand the jury could well have inferred that the judge was siding with the government. While he undoubtedly thought that by aiding and correcting the government attorney, he was merely

redressing the balance between several reputable defense lawyers and one "overwhelmed" government attorney, the obvious effects were 1) to place the defense at a disadvantage in the eyes of the jury by casting the prosecutor in the role of an underdog, United States v. Haley, 452 F.2d 391, 396 n.2 (8th Cir. 1971), cert. denied, 405 U.S. 978, 92 S. Ct. 1205, 31 L.Ed.2d 253 (1972); United States v. Guglielmini, 384 F.2d 602 (2d Cir. 1967), and 2) to suggest to the jury that he favored the government's position. [3]

A few improper comments are not necessarily enough to require reversal. United States v. Porter, 441 F.2d 1204 (8th Cir.) cert. denied, 404 U.S. 911, 92 S. Ct. 2338, 30 L.Ed.2d 184 (1971). Each case must turn on its own circumstances.

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[3]The trial judge had told the jury panel during voir dire that he had served as United States Attorney (Tr. 7).

Here, the judge injected himself into the trial throughout the entire proceeding. Chief Justice Hughes observed Quercia v. United States, supra, 289 U.S. at 470, 53 S.Ct. at 699, that a judge's

> privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." . . . Starr v. United States, 153 U.S. 614, 626, 14 S. Ct. 919, 923, 38 L.Ed. 841.

We have recently had occasion to explain the legal principles applicable in this kind of situation. In United States v. Bland, 697 F.2d 262, 265-66 (8th Cir. 1983), we said:

> This Court has always been reluctant to disturb a judgment of conviction by reason of a few isolated, allegedly prejudicial comments of a trial judge. This is particularly true in a long trial. In each case a balancing process must be employed to determine whether the trial judge's

> comments have pervaded the overall fairness of the proceedings. We think the balance is adversely tipped against the defendant in a criminal trial where the judge's role loses its color of neutrality and tends to accentuate and emphasize the prosecution's case. A trial judge's isolated questioning to clarify ambiguities is one thing; however, a trial judge cannot assume the mantle of an advocate and take over the cross-examination for the government to merely emphasize the government's proof or to question the credibility of the defendant and his witnesses. A judge's slightest indication that he favors the government's case can have an immeasurable effect upon a jury. A trial judge should seldom intervene in the questioning of a witness and then only to clarify isolated testimony. A trial court should never assume the burden of direct or cross-examination.
>
> (Footnotes and citations omitted) (emphasis supplied).

No two cases are alike, and there are differences between Bland and the case before us. The trial in Bland was much shorter, and there the defendant himself took the witness stand. Here, defendants did not testify, and the trial took a total of ten days, including voir dire, argument, instruction, and jury

deliberation. On the other hand, the evidence against the defendant in Bland was, if anything, even stronger than the case made against the defendants before us on this appeal. In Bland, the charge was possession of an unregistered firearm by a felon, and a police officer actually saw Bland with a sawed-off shot-gun in his hands. 697 F.2d at 263.

We recognize that these are matters of judgment and degree, about which reasonable judges may and do differ. We conclude, however, that what was said in Egan v. United States, 287 F. 958, 971 (D.C.Cir. 1923), is apt here: "While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of defendant[s] were so prejudiced thereby as to deprive [them] of that fair and

impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of a crime." In short, our review of the entire record convinces us that the conduct of this trial fell below the Plimsoll line[4] of fairness and the appearance of fairness.[5]

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[4]See, Fikes v. Alabama, 352 U.S. 191, 198, 199, 77 S. Ct. 281, 285, 1 L.Ed.2d 246 (1957)(Frankfurter, J., joined by Brennan, J., concurring.)

[5]The dissenting opinion, citing United States v. Hasting, ___ U.S. ____, 103 S. Ct. 1974, 76 L.Ed.2d 96 (U.S. 1983), suggests that these convictions are being reversed "without proper weight to the relevant interests involved." Post, p. 439. We disagree. In Hasting, a court of appeals had reversed a conviction without considering whether the error it found was harmless, and the Supreme Court did not approve. Here, we have considered the trial court's conduct in the context of all the evidence presented, and we cannot say that there is no "reasonable possibility that the [practice] complained of might have contributed to the conviction." United States v. Hasting, supra, ____ U.S. ____, 103 S. Ct. at 1979, quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230, 11 L.Ed.2d 1717 (1963).

Accordingly, the judgments are reversed, and these causes are remanded to the District Court for further proceedings consistent with this opinion.

LAY, Chief Judge, concurring.

Although I concurred in Judge Henley's original panel opinion, after oral argument on rehearing en banc I became convinced that prejudicial error did occur by undue intrusion into the trial proceedings by the trial court. This case is reversed because of prejudical error occurring by reason of the trial court's comments and excessive questioning of witnesses. Although trial judges may not always agree with the manner in which trial counsel interrogate witnesses or present a case, it is fundamental that the trial judge respect the role of counsel in the adversary process. It is even more

fundamental that the judge remember that he or she is not an advocate and notwithstanding the temptation to enter into the adversarial argument, that the judge exercise the utmost restraint to avoid doing so.

Perhaps this is to the disappointment of some judges, however there exists much empirical evidence justifying such a policy of restraint. At stake is the essence of a fair trial and fair judgment of the facts by a jury. Once the judge assumes the mantle of an advocate the balance of fair process becomes imbalanced and the proceeding becomes inquisitorial in kind. The fair and respected judge is one who becomes detached from the outcome and allows the chips to fall where they may. Some may disagree with this form of justice--but experience has taught us that if the adversarial system should

survive--and there is none proven better--then this is the way it must be. If a trial judge cannot conform to this system, then the administration of justice will continue to require reversals by appellate courts until fair trials with fair procedures prevail.

HENLEY, Senior Circuit Judge, with whom BRIGHT and JOHN R. GIBSON, Circuit Judges, join, concurring and dissenting.

With so much of the court's opinion as adopts Parts I, III and IV of the panel opinion, United States v. Singer, 687 F.2d 1135 (8th Cir. 1982), I agree. But I cannot agree that intervention in the trial by the trial judge was so egregious as to justify reversal of the judgments of conviction. In general, Part II of the panel opinion, 687 F.2d at 1140, sets forth my views on the judicial

intervention aspect of the case and I shall elaborate but briefly.

Appellants mount a somewhat dichotomous attack on intervention by the trial judge. They argue that he projected himself to the jury as an advocate of the government's case and also that he was so critical of government trial counsel as to evoke sympathy for the trial attorney. The court has found facts in support of appellant's contentions and has accepted the proposed inferences to be drawn from those facts as "obvious". Yet the court's reasoning may well be flawed in that it assumes that reaction to mistreatment of the attorney will create sympathy for the attorney's client rather than resentment and reaction against the trial judge and his alleged favorite, the government.

It is to be observed also that the court, unintentionally perhaps, leaves the

impression that in coming to judgment it is influenced by the fact that fifteen motions for mistrial, including one on the second day of trial, were made. See note 2, page 434, majority opinion. In a complex multi-defendant trial where each of six defendants is represented by separate counsel, it is of small consequence that fifteen motions were made in ten days. In making the first motion counsel for Singer felt that although the court's intentions may have been good in instructing, as it did, that absent witnesses could be assumed to be favorable to the defendants, the court's admonition was overstated as it applied to Singer, who is said to have been relying especially upon two missing witnesses[1] as a basis for claiming he was innocently involved in alleged

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[1] We are not informed on the record here as to whether those witnesses, who perhaps were criminals, have by now been apprehended or convicted.

criminal activity. That motion bears no relationship to the charge that the trial judge unduly was critical of the prosecutor and little, if any, to the charge that the trial judge unduly projected himself into the trial. Indeed, later in the trial the judge again, and without objection, told the jurors they could assume certain persons not present in the court would testify for the defendants. (Tr. 426.)

More fundamentally, I disagree with the court's interpretation of the record. It is true that the trial judge intervened actively in the trial of the case. But his actions were not overly partisan and his overall conduct was not oppressive or abusive. Indeed, the atmosphere of the trial seems to have been comparatively relaxed. For example, to enliven a dull morning the judge concluded that a picture speaks "but not very loud." (Tr. 735.)

At the end of the trial, in sending the jury out laughing the judge admonished the jurors about the need for unanimity and closed by saying: "Somebody's got to decide this case. You know, if you come up and you can't decide anything, then somebody else will just be doing it . . . and "Old Judge Lord" will be sitting up here giving the same instructions. So you go ahead now and do your duty."

It is, of course, impractical here to repeat at length from the transcript or to reproduce completely the atmosphere of the trial. But neither those record materials cited by the court nor anything disclosed by a full reading of the transcript persuades me that the conduct of the trial fell below the Plimsoll line of fairness or polluted the waters of justice. Cf. Mesarosh v. United States, 352 U.S. 1, 14, 77 S.Ct. 1, 8, 1 L.Ed.2d 1 (1956).

Finally, I sound a warning that as a means of reversal the court may be expanding unwisely its use of supervisory power over the administration of justice.

Concededly judges well may differ, as we do, on interpretation of the record. Yet no one on the court has found a single reversible error and no meritorious objection to the conduct of the trial was voiced until near the end of the government's case.

Here, one suspects that the reversals come because of strong disapproval of the conduct of the trial judge and without proper weight to the relevant interests involved. Cf. United States v. Hasting, ---U.S.------, 103 S.Ct. 1974, 76 L.Ed. 2d 96 (U.S. 1983), in which the Supreme Court most recently had occasion to condemn reversal of convictions under the supervisory power in disregard of the rule of harmless error. While undoubtedly

most, perhaps all, of the judges of this court would not approve of the manner in which the trial judge conducted this trial, or at least would have conducted it differently, and while they would send a message loud and clear cautioning against excessive intervention in trials, it is neither necessary nor wise to overturn these convictions under our supervisory power over the administration of justice in the district courts. I would affirm.

86-102 (3)

No. _____

Supreme Court, U.S.
FILED
JUL 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

# Supreme Court of the United States

October Term, 1986

MARK LEWIS SINGER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II OF II

MESHBESHER, SINGER & SPENCE, LTD.

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1986 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA, | . Docket No. 4-80 Crim. |
| Plaintiff, | . 52 |
| v. | . |
| MARK LEWIS SINGER, OAKLEY BECHTEL CLINE, III, JOSEPH MICHAEL SAZENSKI, ARTURO AUGUSTIN IZQUIERDO, JOHN PATRICK REYNOLDS, | . Little Rock, .Arkansas November 9, .1983 5:00 O'Clock .P.M. |
| Defendants. | . |

. . . . . .

TELEPHONE CONVERENCE OF
NOVEMBER 9, 1983,

BEFORE THE HONORABLE G. THOMAS EISELE, United States District Judge for the Eastern District of Arkansas.

APPEARANCES: (By Telephone)

| | |
|---|---|
| For the Plaintiff: | JOHN M. LEE, Esq.<br>FRANKLIN L. NOEL, Esq.<br>DANIEL SCHERMER, Esq.<br>Assistant United States Attorneys<br>234 U.S. Courthouse<br>Minneapolis, Minnesota 55401 |
| For Defendant Singer: | RONALD MESHBESHER Esq.<br>1616 Park Avenue<br>Minneapolis, |

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P R O C E E D I N G S

THE COURT: Good afternoon, gentlemen.

MR. LEE: Good afternoon, Judge. I'm going to put you on the speaker phone. It will take me just a few seconds here.

I have Ronald Meshbesher present, Philip Resnick, Mark Peterson, all representing defendants, as well as Mr. Noel and Mr. Schermer of this office.

THE COURT: Very well. I thank you all for coming in. I apologize for being a little late, but I've been working on this matter all day. In fact, --

MR. MESHBESHER: Judge, we're going to have to stop meeting like this.

THE COURT: Well, I started at 4:00 this morning, so I'm about to run out of steam. But I have a heavy docket down here, and I wanted to get into this matter thoroughly and attempt to get it behind me.

Gentlemen, I have made a decision on the basis of the record that has been made. But before I go to the decision, I want to take up a couple of matters.

First, let me tell you that I received both Mr. Meshbesher's letter of the 8th of November and the Government's letter signed by Mr. Noel of November 8th. They came in this afternoon.

Now let me ask this. At one point in one of the hearings -- I think before Judge Murphy -- Mr. Meshbesher offered to introduce as a document what I am assuming to have been the briefing and the affidavits that were being suggested or that were

being prepared as a result of Judge Lord's suggestion at the ex parte conference after the trial but before sentencing and which dealt with preindictment delay.

Mr. Meshbesher, did you have or do you have such a document to offer as an exhibit?

MR. MESHBESHER: I do, Your Honor.

THE COURT: I am going to receive it. I'm not certain what it is. What is the affidavit about and by whom?

MR. MESHBESHER: As you described, it's an affidavit by Ronald Johnson. I think it's the one he referred to in his testimony that you took via telephone.

THE COURT: I'm going to receive it.

Now then, I note elsewhere -- I'm going to ask counsel to help me with this. Do I understand the Eighth Circuit did not really consider the affidavit but based its decision upon the other parts of the record? Is that correct?

MR. LEE: It's my reading of their opinion and it's my understanding based upon talking to the lawyers in this office involved in the case that the Eighth Circuit did not consider those materials.

THE COURT: Well, of course, the Eighth Circuit will know and I just haven't had time to study that particular appellant record, but I thought I would mention it.

MR. MESHBESHER, I'm not sure, Judge Eisele, if that refers to that particular document or another one. It was never clear to me.

THE COURT: Very well.

Now, gentlemen, I think these issues that have been referred to me raise extremely interesting and very sensitive issues. I have given them a lot of thought and stayed awake a lot thinking about it. I have now come to a conclusion. I'm going to -- I have a bunch of handwritten and typed notes here which, I

hope, I can follow through coherently to state the background of the matter and the facts and my reasoning and my conclusions.

First, a brief history of the matter. Defendant Mark Singer and others were convicted on a number of drug-related offenses on December 18, 1980, in the Federal District Court for the District of Minnesota with Chief Judge Miles Lord presiding. Mr. Ronald Meshbesher and Ms. Carroll Grant represented Mr. Singer, who himself was a lawyer.

On June 20, 1983, with three judges dissenting, the Eighth Circuit Court of Appeals, in the exercise of its supervisory power over the administration of criminal justice in this circuit, reversed the convictions of all defendants on the ground that the trial judge so far injected himself into the trial proceedings as to give the jury the impression that he favored the prosecution, thus depriving the defendants from having their guilt or

innocence determined in a proceeding free of a fatal appearance of unfairness. The Court of Appeals did not dismiss the indictment but rather remanded the case for a new trial and further proceedings consistent with its opinion. And I cite the United States versus Singer case, 710 F.2d 431, and particularly pages 432 and 437 with respect to the dispositive actions of the Court of Appeals.

On July 20, 1983, two days after the mandate was filed, Judge Lord disqualified himself and the case was assigned to Judge Diana Murphy. The new trial was scheduled to begin on September 14, 1983.

On September 9, 1983, Mr. Meshbesher received from Assistant United States Attorney John Lee a package of documents in which were copies of documents contained in the confidential lawyer-client file of Mark Singer, located in Mr. Meshbesher's office. Those documents, although now, of course, known by Mr. Singer and

Mr. Meshbesher and, of course, also known by the representatives of the Government, have been received into evidence in this proceeding under a ruling by Judge Murphy protecting them from public disclosure at this time.

They included copies of attorney-client correspondence, trial preparation memoranda, comments on expected testimony, and trial strategy. All appear to be documents prepared before the original trial in 1980.

On September 13, 1983, Mr. Meshbesher moved to dismiss the case against Mark Singer, first, on the ground of prosecutorial misconductd with respect to the documents which had somehow been taken from his office files and second, on the ground of judicial misconduct. At the time the motion was filed Mr. Meshbesher was apparently relying on Judge Lord's conduct during the first trial of Mr. Singer as to the judicial misconduct complained of.

Later during the course of the various proceedings complaints concerning Judge Lord's actions after the first trial, and even after the appeal, were added. All of the other defendants have joined in Mr. Singer's original and expanded motion to dismiss and in the ancillary motions filed by him.

Between and including September 14 and September 20, 1983, several hearings on the motions to dismiss and on the related motions were conducted by Judge Murphy. On motion of the defendants, Judge Murphy on September 27, 1983, recused in the case because she wished to avoid any appearance of impropriety. On October 4, 1983, Chief Judge Lay of the Eighth Circuit assigned the disposition of the motions to dismiss and ancillary proceedings related thereto to this United States District Judge.

All pertinent pleadings, transcripts of open court and in camera hearings and supplemental material have been delivered

to our offices for our use in discharging our duties under Judge Lay's assignment. And all of such material has been read and considered.

Now, gentlemen, on the basis of the in camera and open court showings made by the Government, I have now concluded that the Government to this point has done nothing which would warrant the dismissal of the charges against Mr. Singer or any of his co-defendants. Therefore, I am going to overrule the defendants' motion to dismiss. I will discuss this ruling further in a few minutes.

I have further concluded that it would not be necessary or appropriate for me to pass upon all of the other pending motions, although I will dispose of some of them.

I am this date dictating into the record, outside of the presence of any of you attorneys in the case, that includes both the Government and the defendants'

attorneys, a brief, additional explanation for the purposes of the record and for the judge or judges who handle this matter hereafter of some of the reasoning that has lead (sic) me to the conclusions that I have reached and which I do not feel would be appropriate to disclose on the open record.

Furthermore, I am advising all counsel that although I am denying the defendants' request to divulge the identity of the so-called informer or informers at this time, that issue might be raised again if any change in circumstances might so warrant.

I have already advised the parties that I was overruling defendants' motion to dismiss on the basis of the alleged judicial misconduct. The defendants were given a full opportunity to bring to this Court's attention any and all actions or statements by Chief Judge Lord which they believe might warrant dismissal of the

charges contained in the indictment. Viewing the evidence in the light most favorable to the defendants, this Court has concluded that the same would not warrant, under appropriate legal standards, the dismissal of such charges. A few comments, I believe, are necessary.

There is much ambiguity in the evidence relating to certain of the contacts between the Government's representatives and Judge Lord. Some appear to be completely innocent, accidental, or happenstantial and appear to rise out of the close proximity of the -- probably of the offices of the judge and the daily contacts which judges have with members of the United States Attorney's office.

However, although Judge Lord has not been given any opportunity to respond or to explain, this Court is willing to accept for the purposes of its ruling upon the motion to dismiss that one of the ex parte meetings between the judge and the

prosecutor after the trial, but before the disposition of all post-trial motions and before sentencing, -- that is, the meeting which dealt with the Court's concern about the adequacy of the record and the briefing with respect to the preindictment delays -- was wrong. It cannot be justified under appropriate judicial or professional standards. And as Mr. Meshbesher notes, both the prosecutor and the judge were wrong to participate in this type of an ex parte meeting. The results of that meeting it is assumed went into the record and were part of the record during the appeal.

Now United States District Judges, the trial judges in our federal system, are members of the Judicial Branch of our Government. The United States Attorneys and their assistants are members of the Executive Branch. The Government of the United States comes into our court, our federal courts, on the same footing as other parties to cases filed in our courts.

Government attorneys, like all attorneys, must carefully guard against ex parte contacts with district judges concerning cases and matters pending before such judges.

More importantly, judges should, while maintaining open and cordial relationships with members of the Bar, neither encourage nor permit ex parte comments concerning pending matters from the attorneys involved with those matters.

It appears that Judge Lord here after having heard the evidence at the trial, had strong feelings about the case and a natural curiosity about its progress and management. If the judge had had all parties before him at the time he commented about that the briefing and the record were inadequate in some respects, such comments would not have been ex parte, although some might well contend that it would nevertheless have been further evidence of his inclination to assist the

Government in this case in situations where he obviously felt the Government attorneys were not adequately presenting certain issues.

But here the meetings were ex parte, and the counsel for the defendants were unaware of it and had no opportunity to state their own views on the record, nor did they have the knowledge which would have permitted them to make a point of such ex parte meeting on appeal in connection with their overall attack on Judge Lord's impartiality.

But they won that issue even without this additional circumstance. Had they lost and had the case been affirmed, different arguments for other relief might have been appropriate. But even accepting the Court's -- even accepting that the Court's inviting counsel in and conferring ex parte, as indicated, was wrong, the remedy here should not be the dismissal of

the serious pending charges against the defendants.

The United States of America and the people of this country have the right to have those who have been properly indicted tried upon the criminal charges against them. In all but the rarest of circumstances, then, the independent errors and even the wrongs of the district judge in the management and trial of a criminal case may at most occasion the remedy of a new trial before another judge.

Defendants have already obtained that relief here. This Court finds nothing in the record made concerning the complained-of statements or actions of Judge Lord that will or would prejudice them in the retrial presided over, as it will be, by a different district judge, who will have available to him or to her the tools necessary to deal even with the difficulties created by any possible preju-

dicial pretrial publicity arising out of these proceedings.

Now I must state that no trial judge welcomes the responsibility of passing judgment upon the actions of a fellow trial judge. Furthermore, I identify some with Judge Lord in the trial situation in which he found himself. I, myself, have been known to actively participate in the questioning of witnesses in both criminal and civil cases where such appears necessary in order to clarify the evidence or to assist the jury in discharging its duty to reach a just verdict. Such actions are based upon the firm belief that the courtroom is not simply an arena provided by the taxpayers for the purpose of determining which attorney is the best or most skillful lawyer.

Hopefully the decision of the Eighth Circuit in the Singer case will not inhibit or chill the inclination, and, I submit, the duty of conscientious trial

judges to act upon the predicate that the courtroom is the place where the truth will come out and justice will be done. And I might say, I do not so read the majority opinion in the Singer case as suggesting otherwise.

So while I may hesitate to condemn some of the complained-of participation by Judge Lord in the ten-day trial, this Court does not hesitate to condemn in principle any improper ex parte communication betwen a judge and an attorney, however innocently intended.

But, we destrict (sic) judges all have our bad days and frequently -- even when we act out of our concern to see that justice is done -- we make mistakes and sometimes bad mistakes. But, then, that is what the appellate courts are there for. They can review our actions and our decisions and, where appropriate, reverse us. We don't usually like it, but we recognize

the necessity for, and the importance of, appellate review.

Now all of you attorneys know that there are remedies for serious and egregious judicial misconduct, both under the constitution and, at least some contend, under Acts of Congress and under the supervisory authority of appellate courts. And, of course, there are potential civil remedies when ajudge acts completely outside of his judicial duties and responsibilities.

But it is my opinion that it will be a rare case, indeed, where the Government and the people of this country will be denied the right to prosecute properly alleged law violations because of errors, mistakes, or even wrongs of a trial judge in discharging his official judicial responsibilities.

Now the defendants have urged a double jeopardy argument in connection with the issue of judicial misconduct, as

well as prosecutorial misconduct, but I do not believe it has merit under the facts and circumstances here. Without going into any great detail, I draw your attention to United States versus Jorn, J-o-r-n, 400 U.S. 470 and the comment made at page 479. This was a 1971 Supreme Court case. More particularly I mention United States versus DiFrancesco, 449 U.S. 117 at 131, a 1980 case, in which the United States Supreme Court summarized the applicability of the double jeopardy clause to retrials of defendants who obtained reversals of their convictions on appeal.

I quote: "Finally, if the first trial has ended in a conviction, the double jeopardy guarantee imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." citing North Carolina versus Pearce.

Going on: "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." Citing United States versus Tateo, T-a-t-e-o.

"To require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction, is not an act of Governmental oppression of the sort against which the double jeopardy clause was intended to protect." Citing United States versus Scott.

"There is, however, one exception to this rule: The double jeopardy clause prohibits a retrial after a conviction has been reversed because of insufficiency of the evidence."

Now the general rules appear to control in this case. In addition to all the cases I have found in which convictions

were overturned on the basis of judicial misconduct or bias, the remedy affored (sic) the defendant has been a new trial. I find no cases where the indictments were dismissed. I will mention a few of the cases as examples: Berry versus United States, 283 F.2d 465, (8th Cir. 1960), cert. denied, 364 :U.S. 934; U.S. versus Michienzi, M-i-c-h-i-e-n-z-i, 630 F.2d 455, (6th Cir. 1980); U.S. versus Bray, B-r-a-y, 546 F.2d 851 (10th Cir. 1976); Richards versus U.S. 318 F.2d 639 (9th Cir. '63); U.S. versus Guglielmini, G-u-g-l-i-e-l-m-i-n-i, 384 F.2d 602 (2nd Cir. '67); and :U.S. versus Cassiagnol, C-a-s-s-i-a-g-n-o-l, 420 F.2d 868 (4th Cir. 1970).

In short, where a defendant obtains a reversal of his conviction on any grounds other than the sufficiency -- insufficiency of the evidence, the Government can retry him. Defendants here obtained a reversal on the ground that Judge

Lord's repeated remarks and actions during the trial prevented the defendants from receiving a fair trial. This ground did not go to the sufficiency of the evidence, and, therefore, permits retrial of the matter.

Mr. Meshbesher points out that the ex parte meeting between the judge and the Government counsel involved prosecutorial, as well as judicial misconduct, and, of course, that is true even though counsel are placed in a most difficult and awkward situation if a judge invites or solicits such an ex part meeting.

Nevertheless, despite the admitted wrong, dismissal is clearly not the appropriate remedy under the facts and circumstances as discussed above. The defendants will have a new trial before a different judge and dismissal is not warranted.

Now we return to the allegations of prosecutorial misconduct. The facts con-

cerning Mr. Meshbessher's files, as represented by the Government and as testified to by Sergeant Johnson and Mr. Schermer, are generally as follows: A person who, whether correctly or not, has been referred to as an informer contacted Mr. Schermer and indicated that a crime or crimes had been committed and that said informer had documents which would prove that to be the case. Shortly thereafter, Sergeant Johnson interviewed the informer and was also told that the informer had documents that would prove the commission of a crime or crimes other than those charged in this case.

Before receiving these documents, Sergeant Johnson, and later Mr. Schermer, wre aware that those documents had been taken from the confidential attorney-client files regarding this case found in Mr. Meshbesher's office. But before receiving such documents, Sergeant Johnson, and later Mr. Schermer, also determined that

said files came from a non-government source without any participation on the part of the Government or law enforcement officers.

The original contact by the informer was in the fall of 1982, more particularly in September of 1982. Sergeant Johnson was advised that the informer had had the documents in question for a substantial period of time. It also does not appear that Sergeant Johnson had ever known the so-called informer before the contact I mentioned above. There is evidence that the informer received and had possession of the documents prior to the original trial in 1980.

Several months after the Eighth Circuit reversed defendants' convictions and granted them a new trial, the new attorney for the Government on this case notified Mr. Meshbesher that the Government had possession of such documents and provided him with copies thereof. The Government

stated that it did not intend to use the documents in its case in chief at the retrial. Mr. Meshbesher then filed his motions to dismiss and embarked upon an effort to find the facts and circumstances surrounding the removal of the files from his office.

In that process he sought to determine the identity of the so-called informer. So far he has been denied the right or the opportunity to learn the identity of that person. He has also been somewhat restricted in his right to investigate and to explore the circumstances surrounding the removal of his files or the accuracy of the Government's representations with respect thereto. However, he has been given a fairly broad opportunity to explore with the key Government witnesses, Sergeant Johnson and Mr. Schermer, the circumstances under which they came into possession of the files.

Mr. Meshbesher naturally contends that he is not obligated to accept the testimony or representations of the Government witnesses and that the entire matter should be opened up to a full plenary evidentiary hearing to determine all the facts and circumstances relative to the manner in which the documents were obtained from his office and the manner in which they came into the hands of the Government. Both Judge Murphy and I have ruled that under the facts and circumstances disclosed both in open court and in camera, neither Mr. Meshbesher nor Mr. Singer or the other defendants are entitled to go further in such inquiry.

Although Mr. Meshbesher is suspicious that the Government may have had the files before the first trial and makes certain arguments concerning the Government's handling of the first trial, which he feels suggests that the Government was in possession of such files, the Court

after reviewing the same finds nothing in the record so far developed which would support such conjecture or suspicion on Mr. Meshbesher's part.

Since defendants' counsel admits that they have no other independent evidence contrary to or which would tend to impeach the factual representations made by Sergeant Johnson or Mr. Schermer as to the manner in which they came into possession of the documents, the question becomes whether, in the absence of any such other evidence, the defendants should nevertheless be able to go on a discovery expedition among the Government's attorneys, the Government's agents, their witnesses, and their files.

For the reasons which the Court will state here, and for additional reasons which it will state in its in camera comment outside of the presence of all of the attorneys, the Court has concluded that neither the defendants nor their attorneys

should be permitted to make any further inquiry at this time. In fact, Judge Murphy and I may have permitted defendants' counsel to go further than the law would ordinarily require under the facts and circumstances as have been shown to obtain here. But this is an unusual case. We are dealing with something that is very sacred to a trial attorney, the confidential nature of his files and of the information he obtains in his office.

The Court recognizes the frustrations which defendants' counsel and their clients must feel under the circumstances. But the facts and representations made by the Government in open court and in camera require this Court to cut off further inquiry at this point.

So the question, therefore, becomes whether the receipt, possession, and possible use by the United States of copies of documents taken from the defendants' attorney's file, without authority by a non-gov-

ernment agent and not acting on behalf of the government, violates the defendants' Fifth Amendment right of due process or Sixth Amendment right to effective defense assistance of counsel.

The representations and the testimony, both in open court and in camera, support and are consistent with the Government's view that the files -- that the file documents were taken from Mr. Meshbesher's office by an individual or individuals who were not Government agents and were not in any working for, or at the request, or at the direction of the Government. And further that those documents came to the attention of the Government approximately two years after they were taken and approximately two years after the original trial.

The documents were offered to the Government not to help in the prosecution of the defendants, but to help establish that other, collateral crimes had been

committed. There is absolutely no evidence that the Government was involved in obtaining or soliciting others to obtain the Meshbesher files. Since the files were given to the Government upon the representation that they would disclose evidence of a crime or crimes, the Untied States Attorney's office not only had the right, but it also had the duty, to examine such materials in order to explore such allegations of criminal wrongdoing.

What was said in Burdeau versus McDowell, 256 U.S. 465 at page 475, therefore, applies: "The papers having come into the possession of the Government without a violation of petitioner's rights by Governmental authority, wew see no reason why the fact that individuals unconnected with the Government mayhave wrongfully dtaken them should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."

As far as this record reveals, the Government has acted properly with respect to these documents, which were turned over to it by the informer. Therefore, the motion to dismiss the indictment will be denied.

It think it's important to emphasize that the legitimacy of the Government's actions with respect to the files obtained from Mr. Meshbesher's office in this particular case turns on the representation by the informer that those files would reveal evidence of other crimes. Let's stop for a moment and assume a different scenario.

Assuming the United States Attorney's Office reveived in the mail one morning a file containing evidence -- containing confidential memoranda and trial preparation materials of a defense attorney in a case which is scheduled for trial. Clearly it would be improper for the United States Attorney or attorney for the

Government to read or review those notes or files as soon as he or she became aware of what they in fact were. The duty upon receiving such, in the absence of any allegations that they would be pertinent to any ongoing or contemplated criminal investigation, would be to return them promptly to the defense attorney without looking at them even.

So I emphasize it is a very important circumstance here that these documents were turned over to the Government upon the representations that they would disclose evidence of a crime or crimes.

Now although I'm going to overrule the motion to dismiss the indictment, there is some collateral relief that, I think, the defendants are entitled to. I'm not sure whether this should be incorporated in a specific order, but we have a situation in which clearly a crime was committed when Mr. Meshbesher's files were stolen. The Government learned a few days

before September 16, 1983, that the informant had additional Singer file documents from Meshbesher's office that were not turned over to the Government.

Now, then, Judge Murphy entered some order, in effect, preventing the Government from obtaining any more documents and providing that if it did get them, it should turn them over immediately to her. And very late in the proceedings before she recused, she was about to take up that matter again.

My view is that I can dispose of this issue. These files belong to Mr. Meshbesher. The appropriate law enforcement officers should make every effort to obtain same and to see to it that they are returned to Mr. Meshbesher. Furthermore, those additional files should not be read or examined by any United States Attorney or representative of the Government or law enforcement office, since there is no alle-

gation that those files disclosed any criminal wrongdoing.

The procedure to be followed here, I think, to protect all concerned will be for the appropriate law enforcement officer to obtain the documents, seal them and turn them over to the Clerk of the United States District Court for the District of Minnesota. The Clerk will break the seal and make a brief inventory of the documents, seal the inventory, and then return the documents directly to Mr. Meshbesher without revealing them to any judge of this court or to any other person.

UNITED STATES OF AMERICA
DISTRICT OF MINNESOTA
FOURTH DIVISION

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| UNITED STATES OF AMERICA<br>Plaintiff, | Docket No.<br>4-80 Crim. 52 |
| v. | Little Rock,<br>Arkansas |
| MARK LEWIS SINGER,<br>OAKLEY BECHTEL CLINE, III.<br>JOSEPH MICHAEL SAZENSKI<br>ARTURO AUGUSTIN<br>IZQUIERDO, JOHN PATRICK<br>REYNOLDS,<br><br>Defendants. | December 21,<br>1983 5:00<br>O'Clock p.m. |

FINDINGS OF FACT & CONCLUSIONS OF LAW

Before the Honorable G. THOMAS EISELE, United States District Judge for the Eastern District of Arkansas.

APPEARANCES: (By Telephone)

| | |
|---|---|
| For the Plaintiff: | JOHN M. LEE, Esq.<br>Assistant United States Attorney<br>234 U.S. Courthouse,<br>Mpls., MN 55401 |
| For Defendant Singer: | RONALD MESHBESHER, Esq.<br>Meshbesher, Singer & Spence, Ltd.,<br>1616 Park Avenue<br>Mpls., MN 55404 |

THE COURT: All right, gentlemen, are you there?

MR. LEE: Judge Eisele, this is John Lee.

THE COURT: Yes, Mr. Lee.

Mr. Meshbesher?

MR. MESHBESHER: Mr. Meshbesher is here, Your Honor.

THE COURT: Gentlemen, I am prepared to conclude this matter. I am not going to write an opinion, but I am going to dictate my findings and conclusions at this time, and that will be it. They are as follows:

After a full evidentiary hearing, the Court concludes taht the facts, which will be discussed later, do not warrant the dismissal of the charges pending against Mr. Singer or any of his co-defendants. Therefore, the defendants' motions to dismiss will be overruled. However, the Court is of the opinion that the defendants are entitled to certain relief

in order to protect the defendant Singer's interest in effective representation by an attorney of his choice and all of the defendants' interests in a fair retrial. The granting of such relief will not, of course, prevent the trial judge from granting additional relief should it be requested and merited, or otherwise indicated.

The Court adopts all factual findings heretofore made during the oral arguments on Thursday, December 15, 1983. If, however, there is any conflict or incosistency with the facts now being stated and those stated on December 15, 1984, the facts as stated herein shall control.

The Court finds that copies of the Singer case attorney-client files involved in this controversy were taken from Mr. Meshbesher's office by an individual or individuals who were not government agents and who were not working for, or at the

request of, or at the direction of the government or any law enforcement agency. It is not clear when or how many copies were made and removed from Mr. Meshbesher's control. Apparently the originals of the documents copied have always remained in Mr. Meshbesher's office.

From all the evidence it appears likely that the copies were made immediately before or at the time of the first trial in December 1980. The Court further finds that the copies of the files in question came into the hands of Mr. Marshal Stoll not later than the spring of 1981. Stoll, who was one of the defendants in this indictment, was a fugitive at this time. He surfaced in California around May of 1982, at which time he contacted a public defender by the name of Mr. Daniel Cook. Mr. Cook apparently first attempted to work out a Rule 20 disposition but such negotiations

were not successful and Mr. Stoll had to return to Minnesota where he was arraigned and pled "not guilty" before Magistrate Cudd on July 22, 1982. Mr. Mark Wernick was appointed to represent Mr. Stoll. On August 19, 1982 Wernick was appointed to represent Mr. Stoll, pursuant to some plea agreement, entered a guilty plea before Judge Lord. Seargent Johnson, as the case agent, was present in court when the plea was taken. The Court has received in evidence a copy of the transcript of the plea. I don't believe it ws made an exhibit, but I wanted to make it clear that it is part of the evidence.

The Court finds pursuant to an agreement to cooperate, Mr. Stoll met Sergeant Johnson at Wernick's office sometime around October 1, 1982 for the purpose of being debriefed. The Court finds that sometime before Mr. Stoll turned over the Meshbesher files he read a transcript of the trial testimony of Mr.

Gilbert Singer. The Court further finds that both Sergeant Johnson and Mr. Schermer, the Assistant United States Attorney who tried the case in 1980, were convinced that a Mr. Booker was the kingpin of the drug operation and they were also convinced that Mr. Gilbert Singer had not told the truth with respect to the ownership and control of certain off-shore corporations and the ownership by one of them of a residence in Miami located on 112th Street where Mr. Stoll and others were arrested in April 1978 in possession of some 1500 pounds of marijuana.

The Court further finds that Mr. Stoll, after reading the transcript of Mr. Gilbert Singer's testimony advised Sergeant Johnson that Mr. Singer was lying and that he, Stoll, could prove it is part by copies of certain attorney-client files that he had obtained from Mr. Meshbesher's office. Sergeant Johnson thereupon

inquired of Mr. Schermer if it would be proper for him, Johnson, to obtain copies of said files. Mr. Schermer examined the law and became convinced that the government was entitled to receive, use, and keep such files if it, the government, had played no role in wrongfully procuring those files from Mr. Meshbesher's office. Although the Court, as indicated below, disagrees with this view of the law in good faith. And he so advised Sergeant Johnson. Seargeant Johnson then requested that Mr. Stoll turn over to him all of the copies of the Meshbesher-Singer files that he possessed. It should be stated that Mr. Stoll, shortly after meeting with Sergeant Johnson in Mr. Wernick's office, also met with Sergeant Johnson and Mr. Schermer in the latter's office and repeated his assertion that the Meshbesher files would reveal, he believed, evidence of perjury on the part of Mr. Gilbert Singer.

These facts give focus to one of the central legal issues in this case. It is the Court's view of the law, as previously alluded to during the various hearings herein, that whatever may be the cazse with respect to other types of materials that may innocently come into the government's hands, the government has no right or license to examine confidential attorney-client trial preparation files simply because the government is not associated in any way with the wrongful taking of those files.

The Court has used the illustration of a United States Attorney receiving an envelope in the mail which, when opened, reveals what appears to be the attorney-client file of some defendant who is being prosecuted by that same United States Attorney. The question was put: Would that United States Attorney have the right to read over, study, keep, or use such a file? The Court has concluded that

the answer is "No" and that the United States Attorney in this hypothetical case would be required to immediately return the file to the lawyer without even examining it and certainly without copying it. All parties recognize that the law goes to extremes to protect the attorney-client relationship, to the end that persons charged with crime will be entitled to enjoyh their Sixth Amendment rights to effective representation by attorneys of their choice. Courts should eschew any principle of law that would countenance any intrusion into the attorney-client relationship or which would undermine it or render it ineffective.

However, if a government agent or attorney has reasonable cause to believe that such an attorney-client file contains evidence of other crimes -- that is, other than the crime charged which is the occasion for the existence of the file in

the first place -- or that the file would lead to such evidence, or would reveal the commission of such other crimes, then such governmetn agent or attorney would not only have the right, but would have the duty, to accept possession of such tendered files and, indeed, to examine same. And this is true even if, upon examination, it turns out that said files do not contain evidence of such other crimes as so represented. So it is the representations made, and reasonably believed, that both permit and limit the government's rights to examine, use, or keep such attorney-client files. The case before us is a good illustration.

Mr. Stoll was representing that he believed that the Meshbesher files would show that Mr. Gilbert Singer was lying about the off-shore corporations and the ownership of the land in Miami. It is clear now, after the fact, that very few, if any, of those file documents constitute

actual evidence of perjury. Neither Mr. Schermer nor Sergeant Johnson requested Mr. Stoll to go through the files and turn over to them only those documents which he believed provided some evidence of this other crime. Instead it is clear that Sergeant Johnson actively sought to obtain all of the documents he could prevail upon Stoll to turn over to him. So we have a situation in which the government might, under the Court's view of the law, properly come into control of a very few of the documents at issue, but it would not have had a right to the bulk of the documents.

The government of course will take the position that the Court is making too fine a distinction. It argues that it had to examine all of the documents to determine which, if any might disclose evidence of perjury as represented by Mr. Stoll. But this is an area where nice distinctions are essential if the law is

to strike a reasonable balance between the interests involved.

The law ought to be such that a red flag would go up the moment a government agent, and particularly a government attorney, realizes he has such a confidential attorney-client file in his hand, or that someone is offering him the opportunity to look at, or examine such a file. The first question he should ask is whether there is any possible legal basis which would permit him to even look at such a file. If no representations at all have been made to the government agent or attorney with respect to the contents of the file, then, of cours,e under this Court's view of the law, the duty of the government attorney or agent would be to return the file forthwith, unread, to the rightful owner.

If, on the other hadn, a representation is made that the file contains evidence of a collateral crime,

lthen the government agent must make a serious and consceintious effort not to obtain more of the file than is embraced in the representations concerning collateral wrongdoing. Otherwise, such a representation could become simply an excuse to broadly intrude into and perhaps destroy the underlying attorney-client relationship.

The real evidence here of perjury by Gilbert Singer, if indeed there be any, is the anticipated contrary testimony of Mr. Stoll, assuming he is to be believed. Additionally, Mr. Stoll advised Sergeant Johnson and Mr. Schermer that the real truth concerning the off-shore corporations and the land transactions could be demonstrated by simply following the "money trail" involved in the pertinent transactions. The Meshbesher files are really beside the point. Furthermore, Mr. Stoll's testimony in this proceeding also indicates that he actually

show the commission of a collateral crime. He appeared content to let the government agents examine the files to see if -- and I emphasis the word "if" -- it provided any assistance in that respect. So, although he originally represented that the file did contain such evidence, at the hearing Mr. Stoll backed off, recognizing, at best, that it contained a few documents which might be considered consistent with such a theory.

The Court concludes that the original representations by Mr. Stoll to Sergeant Johnson and to Mr. Schermer would have permitted a limited examination of a few of the documents at issue. It has in fact resulted in a review of the defendant's trial strategy documents which, under proper procedures, the government should never had received or examined.

The government has, therefore, knowingly intruded into the defendant's trial strategy files, albeit in the honest

and good faith belief that it had a perfect legal right to do so. But has the defendant Singer been significantly prejudiced as a result thereof?

Although stated in various terms by the Courts, for a criminal defendant to prove a violation of his Sixth Amendment right to effective representation of counsel of his choice, he must show: one, a knowing intrusion by the government into the attorney-client relationship; and two, prejudice to his defense. See United States versus Davis, 646 F.2d 1298, 1303, Eighth Circuit, 1981, cert. denied 454 U.S. 868 where it is stated:

"In addition to the intrusion on the attorney-client relationship there must exist a nexus between the intrusion and some benefit to the prosecution."

In United States versus Irwin, 612 F.2d 1182, 1186-87, Ninth Circuit, 1980, it is stated:

"From Weatherford and Glover and the cases they interpret, it is apparent that mere government intrusion into the attorney-client relationship, althout not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself in many ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

There are cases which suggest if the government knowingly intrudes into the trial strategy defense files, no proof of

actual prejudice is necessary and that the only appropriate remedy is the dismissal of the indictment. See United States versus Levy, 577 F.2d 200, 207-208, Third Circuit, 1978, where it said, and I quote:

"In our judgment, the only appropriate remedy is the dismissal of the indictment. As a result of the district court's decision that no Sixth Amendment violation occurred, the same strike force group which originally handled the case was allowed to proceed with the trial. The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with

key government witnesses. More important, public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain. At least in this case, where the trial has already taken place, we conclude that dismissal of the indictment is the only appropriate remedy. We need not decide whether dismissal would be required when the defense strategy has been disclosed to government agents but has not become public information."

Not only are the facts different here than they were in the Levy case, but this Court believes that such cases as the Levy case must now yield to the principles stated subsequently by the Supreme Court in the United States versus Morrison I do not have the U.S. citation. 101 S. Ct. 665, 1981. In that case the Supreme Court stated, and I quote:

The Sixth Amendment provides that an accused shall enjoy the right to have the assistance of counsel for his defense. This right, fundamental to our system of justice is meant to assure fairness in the adversary criminal process. Our cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective. Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not be unnecessarily on competing interests. Our relevant cases reflect this approach."

The Court then discusses those cases and then it goes on to say:

"Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to ssure the defendant the

effective assistance of counsel and a fair trial."

Further on it states: "More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."

And, finally the Court concludes: "In arriving at this conclusion,we do not condone the egregious behavior of the government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings."

Simith versus Phillips, 102 S. Ct. 940, 947, a 1982 case, also provides some guidance for us even though it did not deal with the Sixth Amendment situation. There the Court said:

"The touchstone of due process analysis in cases of alleged prosecutorial

misconduct is the fairness of the trial, not the culpability of the prosecutor."

The further on: "The aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused."

The wisdom of the Supreme Court in refusing to adopt a per-se approach can be seen when one further examines the facts in this case. This is not a case where the trial strategy documents were examined before the original trial. Those files were not seen by the government until almost two years after the first trial. The government has suggested that the strategfy information prepared by the defendant Singer and his attorneys in anticipation of the first trial is now strictly "old news."

And, indeed, it must be conceded that the best evidence of the defendant Singer's trial strategy for the first

trial will be found in the transcript of the trial. Naturally the conduct of a trial will reveal the strategy used.

The Court notes also that the files were sealed by Judge Murphy and that none of the strategy portions of such files, contrary to the situation in the Levy case, have become or has become a part of the public domain. A very few items have been used by the defendant in examining and cross examining witnesses. And, of course, Sergeant Johnson and several Assistant United States Attorneys are familiar with the entire file. But the trial preparation and strategy files have not become a part of the public domain.

The government, furthermore, has represented to the defendants and to the Court that it does not intend to use the files in its "case in chief" during the retrial. The Court, however, is not satisfied that either the government's "old news theory or its undertaking to

limits its use of the Meshbesher files is adequate to demonstrate no prejudice or to adequately guard against possible future prejudice.

If the government's trial attorney is thouroughly familiar with the defendant's strategy files, it is almost impossible to state with any assurance that the defendant will not be prejudiced directly or indirectly by their use during the retrial. And, a fortiori, if the government is actually permitted to overtly use those files while cross examining witnesses for the defense and during rebuttal, the prejudice is obvious. What is needed, therefore, is an order, or orders, of the Court which will, for practical purposes at lease, remove any significant threat of actual prejudice derived from the knowledge or possession of such confidential strategy files.

The Court will therefore order the government to forthwith return to the

defendant Singer's attorney, Mr. Meshbesher, all copies of such documents in its possession or in the possession of any law enforcement officer working on the case, excepting only those file documents which it specifically represents to the Court contain evidence of perjury by Mr. Gilbert Singer or subornation of perjury. Of course, one copy thereof will remain as an in-camera exhibit in this proceeding at least until its termination.

The Court will further order that no United States Attorney, Assistant United States Attorney, or other government attorney who has examined, discussed, or otherwise become aware of any of the contents of the Singer-Meshbesher file will be permitted to participate in the retrial of this case. The United States Attorney for the District of Minnesota will have to determine whether any Assistant United States Attorney in his office can meet this test. If not, some

"outside" United States Attorney or Justice Department attorney will have to be chosen.

In addition, the Court will order Sergeant Johnson and all other law enforcement officers having any knowledge of the Singer-Meshbesher files never to mention, use, or refer to same while working on this case with the attorney assigned thereafter to handle the retrial.

The Court now turns to the remaining issue. The defendant Singer contends that the indictment should be dismissed because of the misconduct of the prosecution in "going public" concerning the Meshbesher files and the suggestion that those files contained evidence of perjury by Mr. Gilbert Singer and subornation of perjury by Mr. Meshbesher. It is contended that the intent of the government was to drive a wedge between Mark Singer and his attorney, Mr. Meshbesher, and that the effect has been to deny Mr. Singer

effective representation by the counsel of his choice and to deny him and the other defendants of the possibility of a fair retrial.

From the evidence the Court finds that no one in the United States Attorney's office and, indeed no federal law enforcement employee, leaked the story to the press or was responsible in any way for the unfortunate publicity.

When Mr. Meshbesher received copies of his confidential files from the United States Attorney's office he was naturally outraged, complained bitterly, and suspicioned the worst. He immediately filed the motions to dismiss that we are presently dealing with,and his public reaction became the object of certain news reports in the media. It is essentially the response to such news reports that Mr. Meshbesher is complaining of.

The evidence clearly indicates that Sergeant Johnson, a Minneapolis police

officer working with the DEA, was not only convinced of the merits of this drug case but also firmly believed that Mr. Gilbert Singer had lied when he testified during the first trial. As indicated above, he was convinced of this long before he ever met Mr. Stoll or saw the Meshbesher files. Mr. Schermer was likewise so convinced.

It is also obvious from the evidence that Sergeant Johnson is not fan of Mr. Meshbesher's. In fact, he bears a strong animosity toward Mr. Meshbesher which probably does not arise solely out of the circumstances of this particular case.

After Stoll surfaced and agreed to cooperate and testify and after he provided the Meshbesher files, Sergeant Johnson pushed for the prosecution of Mr. Gilbert Singer for perjury and of Mr. Meshbesher for subornation. When it appears to Sergeant Johnson that the United States Attorney's office did not necessarily agree with him that such

charges should be prosecuted, Sergeant Johnson became indignant. He apparently complained to Judge Lord that the perjury committed in the latter's court was going unprosecuted. When Mr. Meshbesher's motion to dismiss and his complaints of prosecutorial abuse were aired to the media, the Court infers that the prosecutive agencies involved felt a need to defend themselves against such public charges. The Court also infers that someone in the Minneapolis Police Department leaked certain information to the reporter, Mr. McEnroe, which in turn became the basis of the stories presently complained of by the defendants.

It appears to the Court that the motives of Mr. McEnroe source were two-fold: to put pressure on the United States Attorney's office to prosecute the perjury and the subornation of perjury charges and to defend the law enforcement agencies involved against the suggestion

that they were improperly or unlawfully using the Meshbesher files. The Court can find no intent to prejudice the retrial of the defendants in this case or to interfere with the attorney-client relationship between Mr. Meshbesher and Mr. Singer, although there are obvious possible adverse effects in both such areas.

The Court, while recognizing the natural inclination of law enforcement officers to defend themselves against what they believed to be irresponsible charges, nevertheless does not hesitate to condemn the leaking of information not truly based upon fact which of necessity would be harmful to Mr. Meshbesher and to his relationship with his client, Mr. Singer all on the eve of the scheduled trial of this case.

The government, while denying any prosecutorial abuse, argues further that if there was such abuse it had nothing to

do with this case. Such an argument simply will not hold water. It is true that the controversy appeared to revolve around possible collateral criminal charges against Mr. Gilbert Singer and Mr. Meshbesher rather than the issues in this case. However, the perjury alluded to was supposed to have occurred in the first trial of this case, and the suggestion that such in fact occurred and that Mr. Meshbesher had a part in bringing it about can only be regarded as extremely prejudicial to the defendants in this case.

To summarize, the Court finds that the federal prosecutive officials did not directly or indirectly have anything to do with the unfortunate and unfair media publicity arising out of the leak to Mr. McEnroe. In fact, it appears that that leak was partially motivated by a desire to put pressure on such prosecuting

officials to make them pursue the perjury and subornation allegations.

Nevertheless the prosecution of this case appears to have been a joint venture between the Minneapolis Police officials and the Federal Drug Enforcement officials. From the viewpoint of the defendants it matters not that the source of the leak to the media may have been a non-federal police official involved in the prosecution of this case rather than a federal official.

The Court accepts, albeit hesitantly, that law enforcement officials charged with prosecution of this case have improperly leaked information to the press which has had the effect of interfering with the attorney-client relationship between Mr. Singer and Mr. Meshbesher and has also had the effect of creating prejudicial pretrial publicity. Therefore, what is the remedy?

As indicated, the Court accepts that the leak causing the pretrial publicity about the alleged perjury and subornation charges has potentially prejudiced the attorney-client relationship between Mr. Singer and Mr. Meshbesher. Additionally, the Court acknowledges that it may create the possibility of prejudice against all of the defendants at their retrial. Can relief less drastic than dismissal of the indictment adequately solve the problem? The cases clearly indicate that the trial court should make every effort to salvage the prosecution if it can do so by less drastic means that will protect the affected defendants' interests. See the Morrison case I referred to above and also United States versus Abbott Laboratories, 505 F.2d 565, 571, Fourth Circuit 1975, where the Court reversed the District Court which had dismissed the indictment against the defendant for prosecutorial

misconduct in leaking information to the press concerning the case stating:

"Irrespective of the outcome of this case, we join in the district court's condemnation of his conduct and express our strongest disapproval that highly placed legal officers would make a statement of this import with regard to a pending criminal prosecution, and even more so that FDA, which had referred the matter to the Department of Justice, would issue a press release containing such prejudicial material. We are presented, however, with the question of whether this misconduct on the part of the government was so prejudicial to the defendants' right to a fair trial that it should be redressed by dismissal of the indictment with the consequent effect that the interests of society in enforcement of the law should be terminated before the guilt or innocence of the defendants has been determined. What disciplinary action

should be taken in this or any future case against responsible government employees or officials for the patent threat to defendants' right to a fair trial is not a question before us, although it may subsequently become the subject of separate proceedings."

I am still quoting from the Abbott Laboratories case:

"No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.le., voir dire, change of venue, continuance, pretrial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded, and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned, to see if an impartial jury can be impanelled."

The Court then goes on to say: "Of course in the instant case, the factor of governmental misconduct in initiating prejudicial pretrial publicity is greater than it was in Wansley; but this is a distinction, for present purposes, largely without a difference, since the outcome of the case, as we see it, depends upon whether fairness to defendants may still be accomplished and not whether misconduct of the government warrants punishment which also forfeits the rights of society."

"Although Abbot Labs was a due process case rather than a Sixth Amendment case, the analysis for either is the same. The focus is on whether the wedge driven between defendant's and their counsel can be satisfactorily withdrawn and a fair trial had."

Mr. Meshbesher and Mr. Singer have both advised the Court that Mr. Singer has, because of the events here in issue,

decided to drop Mr. Meshbesher and obtain substitute counsel for the retrial of this case. That, of course, is Mr. Singer's right and perogative. But can it truly be argued that the adverse publicity has rendered Mr. Meshbesher's participation at the retrial untenable? Either a continuance or a transfer to another district for trial could, the Court suggests, solve the problem. But it is the defendant who would have to request either of these alternative forms of relief. Who knows? The defendant might come to the conclusion that he could turn recent events to his own advantage by an immediate trial in Minnesota.

The court will retain jurisdiction of this motion until December 28, 1983. If the defendants request for a change of venue to another district under Rule 21 of the Federal Rules of Criminal Procedure by that date, that request will be granted. Of course, even if defendants do not so

move by December 28, 1983, they will be free to attempt to convince the trial judge to grant such a motion later on. And, of course, consistent with speedy trial requirements they may always apply to the trial court for a continuance so that the effect of pretrial publicity may be dissipated by the date of retrial.

Now I mention the possibility of a transfer to another district for trial. I have used that process myself, transferring cases here to be tried in Tennessee. Judge Nangle in Missouri has brought a St. Louis case here to Little Rock for trial under the same rule.

Very well. The Court will return this case to Judge Murphy for further processing or reassignment not later than December 31, 1983 in conformity with the orders of Judge Lay.

Gentlemen, that's it.

Is there anything else?

I can't hear you. Speak up.

MR. LEE: John Lee. I don't have anything to add at this point. Mr. Meshbesher is here.

THE COURT: Mr. Meshbesher?

MR. MESHBESHER: I assume that that's in writing, Your Honor. How soon will we get it?

THE COURT: It's partially typed, handwritten notes, partially cases from which I have read. So what you have is the court reporter has taken it all down, and I think the only feasible way is to ask her to prepare a copy of it for your benefit. I can ask her now if you wish how soon you might get that, but I know there are going to be a lot of problmes here in the holiday period and also we are in the middle of a big ice and snow storm down here.

Let me go off the record.

(Discussion off the record.)

THE COURT: All right, gentlemen, I am told that she will make an effort to get

it to you the first part of next week. That's the best we can do.

MR. MESHBESHER: I understand all proceedings will be stayed at least until the 28th or the 31st?

THE COURT: I'm giving you to the 28th to file any such motion to another district. In any event, this case will return to Minnesota by the 31st in accordance with Judge Lay's commission.

MR. MESHBESHER: The reason I asked is that is there a formal stay to be granted because I am contemplating taking the matter to the Eighth Circuit.

THE COURT: That will be a problem that a judge there in Minnesota can handle. When the case comes back, if you take it to the Eighth Circuit they can handle the problems at the trial level.

MR. MESHBESHER: Thank you, Your Honor.

MR. LEE: Thank you, Your Honor.

THE COURT: Nice to have met you both.

(Whereupon, at 5:45 p.m. the telephone conference was concluded.)

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-102 (A)

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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MARK LEWIS SINGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

CHARLES FRIED
*Solicitor General*

WILLIAM F. WELD
*Assistant Attorney General*

SIDNEY M. GLAZER
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

1986

## QUESTIONS PRESENTED

1. Whether the indictment against petitioner should have been dismissed because petitioner's counsel of choice decided to withdraw after the prosecutor acquired and reviewed portions of the attorney's trial file and the prosecutor and the trial judge thereafter made public statements suggesting that the attorney had sponsored perjurious testimony at petitioner's first trial.

2. Whether the Double Jeopardy Clause precluded a retrial of petitioner after his conviction was reversed on the grounds of judicial misconduct.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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No. 86-102

MARK LEWIS SINGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (I Pet. App. 1-74) is reported at 785 F.2d 228. Earlier opinions of the court of appeals, affirming petitioner's conviction at his first trial and later reversing that conviction en banc, are reported at 687 F.2d 1135 and 710 F.2d 431.

### JURISDICTION

The judgment of the court of appeals was entered on February 26, 1986. A petition for rehearing was denied on May 20, 1986. The petition for a writ of certiorari was filed on July 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiracy to import and distribute marijuana, in violation of 18 U.S.C. 371, and one count of attempt to distribute marijuana, in violation of 21 U.S.C. 846. He was sentenced to two consecutive five-year terms of imprisonment.

1. The evidence at trial, the sufficiency of which is not disputed, showed that between October 1977 and June 1978 petitioner and his co-conspirators obtained hundreds of pounds of marijuana each week and transported the drugs from Miami to the Minneapolis and San Francisco areas for distribution. The conspirators used private air freight forwarders and concealed the marijuana inside plastic crocks purportedly containing coral rock, shells, and photographic supplies. II Tr. 66, 73-74, 83-87, 113; III Tr. 383, 393; IV Tr. 536. Upon arrival, the marijuana was delivered to safe houses or stored in warehouse facilities. From there, it was weighed, placed into smaller packets, and distributed. IV Tr. 533-534.

Petitioner was initially a currency courier for the enterprise, making trips to collect drug proceeds no less than once a week and usually more often. Later, petitioner began to assume additional responsibilities in the enterprise. He obtained marijuana, packaged it, and delivered the parcels to the air freight forwarder. In addition, petitioner, a lawyer, acted as a legal adviser for the enterprise. In that capacity, he encouraged his co-conspirators, inter alia, to carry their cash in stamped envelopes, so as to reduce the risk that authorities might discover the cash without a search warrant. For his efforts, petitioner received

$10,000 to $20,000 per month. II Tr. 66, 77, 93-95; III Tr. 407; IV Tr. 540, 560-561.

On June 9, 1978, petitioner and a co-defendant were arrested at the Miami office of an air freight forwarder, attempting to ship several parcels containing marijuana. At the time, petitioner was carrying a folder that listed the address of a Miami warehouse in which police subsequently discovered marijuana. The folder also contained documents that referred to prior marijuana shipments and to tools and materials found in the warehouse. III Tr. 302-348.

2. Petitioner was tried twice; his first conviction was reversed because of misconduct by the trial court (I Pet. App. 3-4). On September 9, 1983, five days before the case was to be retried before another judge, the United States Attorney notified petitioner's attorney, Ronald I. Meshbesher, that he had received copies of 56 documents from Meshbesher's file pertaining to petitioner. On September 14, petitioner moved to dismiss the indictment, alleging that the government had engaged in misconduct in obtaining the file. I Pet. App. 4-5.

The hearing on this motion was scheduled before Judge Murphy, the new judge assigned to the case. At the hearing, Assistant United States Attorney Daniel W. Schermer, the prosecutor at the first trial, testified that he had received the documents in question from Marshall Stoll, one of petitioner's co-conspirators. Schermer explained that Stoll had advised him, prior to delivering the documents, that the materials would provide proof that perjury had been committed at the first trial. I Pet. App. 5.

Before the hearings were completed, the United States Attorney, the Minneapolis Chief of Police, and Judge Lord (who had presided at the first trial) gave

separate statements to the press regarding the file obtained from Meshbesher's office. According to the newspaper accounts, the statements asserted that the attorney's file showed that Gilbert Singer, petitioner's father, had committed perjury at the first trial and that he had done so with Meshbesher's approval. Thereafter, on September 20, 1983, Judge Lord wrote to Judge Murphy that "it has been my experience that defense counsel in criminal cases are much more interested in questions than in answers," and offered to testify at the hearings. Schermer also testified that between petitioner's conviction at the first trial and the filing of his post-trial motions, Judge Lord had initiated an ex parte meeting with Schermer to express concern about the trial record and to urge the government to supplement the record so as to avoid reversal on appeal. I Pet. App. 5-6.

Based on these new developments, petitioner enlarged his motion to dismiss to include the statements made to the press and the ex parte conduct of Judge Lord. Meshbesher also moved to withdraw as defense counsel, claiming that the newspaper accounts—together with what he perceived to be the possibility of his own prosecution for subornation of perjury—would chill his ability to represent petitioner. Judge Murphy granted the withdrawal request; on petitioner's motion, she also recused herself from presiding any further at the hearing. In her place, Judge G. Thomas Eisele, Chief Judge of the United States District Court for the Eastern District of Arkansas, was designated to complete the hearings. I Pet. App. 7-8.

After entertaining additional evidence over the next two months, Judge Eisele determined that while the government's use of Meshbesher's documents and

its subsequent statements to the press had violated petitioner's Sixth Amendment rights, there was no need to dismiss the indictment (I Pet. App. 8-9). The court found, first, that an employee in Meshbesher's law office—in no way connected with the government or with a law enforcement agency—had photocopied the file and turned it over to Stoll (I Pet. App. 10). The court found further that Assistant United States Attorney Schermer had researched the law and had concluded in good faith that the government could lawfully examine the file. But while a limited examination of the file was justified, Judge Eisele concluded that the government had examined portions of the file that were not related to the allegations of perjury. In so doing, the court held, the government had wrongfully intruded, though in good faith, into the attorney-client relationship, infringing petitioner's Sixth Amendment rights. I Pet. App. 11-13.

Judge Eisele concluded, however, that the violation did not warrant dismissing the indictment; instead, he fashioned a remedy to insulate petitioner on retrial from any effects of the violation. Judge Eisele ordered the government to return all documents from the file except those that it specifically represented contained evidence of perjury and subornation of perjury. He further ordered that no government attorney with knowledge of the documents be permitted to participate at the retrial. Finally, the court ordered that no law enforcement officer with knowledge of the contents of the documents be permitted to use them or mention them while working on the case. I Pet. App. 13-14; 785 F.2d 228, 232.

The district court next found that law enforcement officials had improperly leaked information about the

Meshbesher file to the press. While the court found that there was no intent to prejudice defendant upon retrial or to interfere with the attorney-client relationship, Judge Eisele held that the leaks potentially prejudiced Meshbesher's effectiveness, in violation of the Sixth Amendment. Nevertheless, the court concluded that Meshbesher's continued representation of petitioner was not untenable, and that he was not compelled to withdraw. The court reasoned that the passage of time or retrial in a different locale could adequately dissipate any potential prejudice and still permit petitioner to continue to be represented by his counsel of choice. Judge Eisele therefore permitted petitioner to move for a continuance or a change of venue; petitioner declined to make timely motions and Meshbesher refused to reconsider his withdrawal from the case. I Pet. App. 14-16.

Finally, Judge Eisele found that Judge Lord's ex parte contact with the government and other acts of misconduct did not demonstrate an intent to prejudice petitioner. Accordingly, Judge Eisele held, there was no double jeopardy bar to a retrial. I Pet. App. 16-17. On May 31, 1984, petitioner's retrial commenced, with new counsel, before Judge Murphy.[1] After an eight-day trial, petitioner was convicted. I Pet. App. 17, 20.

3. The court of appeals affirmed by a divided vote (I Pet. App. 1-74). The court accepted Judge Eisele's conclusion that the government's use of Meshbesher's file and the statements to the press had abridged peti-

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[1] Petitioner was represented by appointed counsel, while the government, pursuant to Judge Eisele's order, was represented by two Assistant United States Attorneys from the District of North Dakota. In addition, the case agent was replaced. I Pet. App. 17.

tioner's Sixth Amendment rights (I Pet. App. 25-26, 36-38). It held, however, that under this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), the constitutional violation did not require the indictment to be dismissed. The court upheld as not clearly erroneous the district court's finding that "either the passage of time or the shifting of the trial to a different locale would serve to dissipate any derogation to Meshbesher's integrity resulting from governmental impropriety" (I Pet. App. 38). By "permitt[ing] [petitioner] to move for a continuance or a change of venue" the district judge had "tailored a remedy to avoid prejudice and to remove the taint of the violation" (I Pet. App. 38-39). In light of this remedial option—which petitioner elected to forego—the court concluded that Judge Eisele did not err in finding that Meshbesher's continued representation of petitioner "was not untenable" (I Pet. App. 34, 39).[2]

The court also rejected petitioner's double jeopardy claim. Although it regarded as "complicated and close" the question whether retrial of a defendant is barred where his conviction has been reversed due to judicial misconduct, the court concluded that it was unnecessary to resolve that question in this case (I Pet. App. 48). Surveying the factual record, the court held that "[e]ven when colored by his post-trial misconduct," the actions of Judge Lord at the first trial "do[] not evince the bad faith or design to prejudice the defendant's prospects for acquittal that * * * are prerequisite to invocation of the double

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[2] Alternatively, the court held that "even if government officials' statements to the press did create in Meshbesher a conflict of interest requiring withdrawal, there is no claim that [petitioner's] appointed counsel rendered ineffective assistance" (I Pet. App. 34).

jeopardy bar" (I Pet. App. 51-52). Under these circumstances, the court concluded, retrial was the proper course (I Pet. App. 54).[3]

Judge Bright dissented (I Pet. App. 67-74). He concluded that defense counsel had been forced to withdraw and that Judge Eisele's order "did not serve as a curative for the government's conduct" (I Pet. App. 68). Because petitioner had lost "the services of his counsel of choice," Judge Bright would have ordered that the indictment be dismissed (I Pet. App. 74).

**ARGUMENT**

1. Petitioner contends (Pet. 31-47) that the prosecutor's conduct in examining Meshbesher's files, coupled with the statements made to the press by the government and by Judge Lord, caused petitioner to lose the services of his counsel of choice and thus violated his Sixth Amendment rights. As a consequence, he urges, the indictment against him should have been dismissed. The court of appeals agreed that petitioner's Sixth Amendment rights had been abridged; it nevertheless held that the dismissal of the indictment was unwarranted—first, because Meshbesher was not required to withdraw; and second, because, in light of the adequate trial performance of petitioner's replacement counsel, petitioner suffered no prejudice by losing Meshbesher's services.

In *United States* v. *Morrison*, 449 U.S. 361, 365 (1981), this Court held that where the government has violated a defendant's Sixth Amendment right to counsel, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is

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[3] The court also rejected several other legal claims not presented in the petition (I Pet. App. 26-34, 55-67).

plainly inappropriate, even though the violation may have been deliberate." In *Morrison*, federal agents sought to enlist the cooperation of an indicted defendant whom the agents knew to be represented by counsel. In the course of their overtures to the defendant, the agents disparaged the abilities of retained counsel and suggested that the defendant would be better off with a public defender. The court of appeals dismissed the indictment, but this Court reversed. The Court noted that "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" (449 U.S. at 364). Even where defendants have been "totally denied the assistance of counsel" or where "judicial action before or during trial prevented counsel from being fully effective" or where "law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer * * * the conviction in each case was reversed and the Government was free to proceed with a new trial" (*id.* at 364-365). "Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial" (*id.* at 365). Accord, *United States* v. *Bell*, 776 F.2d 965, 971-973 (11th Cir. 1985), cert. denied, No. 85-1491 (June 23, 1986); *United States* v. *King*, 753 F.2d 1 (1st Cir. 1985); *United States* v. *Rogers*, 751 F.2d 1074, 1077-1079 (9th Cir. 1985); *United States* v. *McKenzie*, 678 F.2d 629, 631 (5th Cir.), cert. denied, 459 U.S. 1038 (1982). See also *United States* v. *Solomon*, 679 F.2d 1246, 1250-1251 (8th Cir. 1982).

In this case Judge Eisele scrupulously followed the dictates of *Morrison* and fashioned a remedy intended to "neutralize the taint" of the violation of petitioner's Sixth Amendment rights. He permitted petitioner to move for a continuance or a change of venue, concluding that "the passage of time or the shifting of the trial to a different locale would serve to dissipate any derogation to Meshbesher's integrity resulting from governmental impropriety" (I Pet. App. 38). The court of appeals concluded that the finding that these remedies would permit Meshbesher to remain as petitioner's attorney was not clearly erroneous (*ibid.*), and petitioner's challenge to that fact-bound conclusion is unavailing.[4]

Petitioner insists (Pet. 42-43) that Meshbesher could not discharge his duties so long as a disloyal employee in his firm might continue to furnish confidential materials to the government. But even if the remedial order of Judge Eisele—which brought new prosecutors into the case and flatly precluded any contact with the tainted materials—did not prevent the government from making future use of similar materials, any fear on counsel's part that the government might repeat its previous actions could have been dispelled by additional instructions of the trial court to the government; withdrawal by defense coun-

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[4] Petitioner contends (Pet. 44-47) that the court of appeals erred in applying a "clearly erroneous" standard to the district court's finding that withdrawal by petitioner's counsel was not required in light of the option to change venue and grant a continuance. According to petitioner, the court of appeals failed "to independently analyze whether Meshbesher's ethical duties, applied to the facts as found, forced him to withdraw" (Pet. 46). Petitioner fails, however, to adduce any legal authority that required Meshbesher, on this record, to withdraw as trial counsel.

sel was not required. Nor was counsel obliged to withdraw "because of the false criminal accusations being made against him" (Pet. 41). Petitioner's counsel was in no different position from any other defense attorney who has used a witness that the prosecutor believes in good faith to have given false testimony. Whether an attorney in that position should withdraw is a decision for the attorney to make, in consultation with his client and subject to court approval. In no sense was counsel compelled to make the choice that he made; certainly, petitioner points to no authority that required his attorney to withdraw. The trial judge, affirmed by the court of appeals, determined that the remedial order—carefully tailored to overcome the effects of the Sixth Amendment taint—would permit Meshbesher to continue as petitioner's attorney at the retrial. That fact-bound decision warrants no further review.[5]

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[5] Petitioner contends that the court of appeals erred in holding that he was not prejudiced by Meshbesher's withdrawal since petitioner's new attorney did a perfectly adequate job at trial. Relying on cases in which a defendant's counsel of choice has been improperly disqualified or otherwise removed by a district judge, petitioner asks the Court to decide whether, as a matter of constitutional law, prejudice should be presumed when an attorney has been wrongfully disqualified. Pet. 36-40. This case simply does not raise that question since the district court, affirmed by the court of appeals, held that Meshbesher could continue to represent his client. Petitioner nevertheless suggests (Pet. 40) that the Court "not be deterred from reviewing this case because of th[at] * * * alternate holding"; he argues that "alternate grounds for a holding are considered independent, and not dicta." But that principle governs only the precedential significance of alternative holdings of this Court (see *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 485-486 (1924)) ;

2. Relying on this Court's decision in *United States* v. *Dinitz*, 424 U.S. 600 (1976), petitioner contends (Pet. 47-56) that his conviction at the first trial was the product of " 'bad faith conduct by [the] judge * * * [intended] to prejudice his prospects for an acquittal' " (Pet. 48, quoting *Dinitz*, 424 U.S. at 611); accordingly, he contends, the Double Jeopardy Clause barred his retrial. In rejecting that claim, the court of appeals chose not to decide the broad question whether the Double Jeopardy Clause may sometimes be invoked to bar retrial after a conviction has been reversed due to judicial misconduct. Pretermitting that issue, the court held that even if a retrial may sometimes be barred, Judge Lord's misconduct did not "evince the bad faith or design to prejudice the defendant's prospects for acquittal" sufficient to implicate the Double Jeopardy Clause (I Pet. App. 48-54). That decision is plainly correct and does not warrant further review.

We note, first, that this Court would seem to have foreclosed the broader double jeopardy claim pressed by petitioner, stating repeatedly in its decisions that,

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it is not a reason for the Court to review constitutional questions raised, if at all, only in alternative holdings of courts of appeals. In any event, in each of the cases cited by petitioner (Pet. 38-40) for the proposition that prejudice need not be shown when counsel of choice has been improperly disqualified, the remedy imposed by the court of appeals was a new trial, not dismissal of the indictment. See, *e.g.*, *United States* v. *Washington*, 782 F.2d 807, 813 n.7 (9th Cir. 1986); *United States* v. *Rankin*, 779 F.2d 956, 961 (3d Cir. 1986); *Linton* v. *Perini*, 656 F.2d 207, 212 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *Gandy* v. *Alabama*, 569 F.2d 1318, 1328 (5th Cir. 1978). Petitioner has already received a second trial, at which his counsel of choice elected not to represent him.

with the narrow exception of reversals predicated upon an insufficiency of the evidence, the Double Jeopardy Clause does not preclude the government from retrying a defendant whose conviction has been reversed on appeal. In *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), the Court, setting forth the "general principles [that] emerge from the Court's double jeopardy decisions and [that] may be regarded as essentially settled" (449 U.S. at 127), stated, "if the first trial has ended in a conviction, the double jeopardy guarantee 'imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside' " (*id.* at 131, quoting *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969) (emphasis in original)). From this rule the Court in *DiFrancesco* identified one—and only one—exception: "the Double Jeopardy Clause prohibits retrial after a conviction has been reversed because of insufficiency of the evidence" (*ibid.*). More recently, in *Oregon* v. *Kennedy*, 456 U.S. 667, 676 n.6 (1982), the Court reiterated that "[t]his Court has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence." Accord, *Greene* v. *Massey*, 437 U.S. 19, 25-26 (1978) (reversal based on "trial error" rather than sufficiency of the evidence "would not prevent a retrial"); *Burks* v. *United States*, 437 U.S. 1, 15 (1978) ("reversal for trial error"—such as "incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct"—"as distinguished from evidentiary insufficiency, does not constitute a decision to the effect

that the government has failed to prove its case. * * * When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished"); *Dinitz*, 424 U.S. at 610; *United States* v. *Tateo*, 377 U.S. 463, 465-466 (1964); *United States* v. *Ball*, 163 U.S. 662, 672 (1896). But see, *e.g.*, *United States* v. *Curtis*, 683 F.2d 769, 773-776 (3d Cir.) (characterizing the issue as not yet settled by this Court), cert. denied, 459 U.S. 1018 (1982); *United States* v. *Singleterry*, 683 F.2d 122, 123-124 (5th Cir.) (same), cert. denied, 459 U.S. 1021 (1982). Petitioner's conviction was set aside because of judicial misconduct, not because of any insufficiency in the evidence. There was thus no double jeopardy bar to retrying him.

Petitioner notes (Pet. 48, 51) that, under *Dinitz* and *Kennedy*, judicial misconduct amounting to "bad faith" and intended "to avoid an acquittal" may preclude a retrial when it provokes a mistrial; he reasons that the same rule should bar a retrial where, as here, a conviction has been reversed because of judicial improprieties that should have prompted the district court to grant a mistrial, but failed to. Even were this a plausible reading of the cases, the court of appeals was plainly correct in holding that, on this factual record, petitioner has failed to show that the misconduct of Judge Lord either was exercised in "bad faith" or was intended to prejudice petitioner's case. Judge Eisele held extensive hearings that were devoted, in large part, to the misconduct of Judge Lord; and the court of appeals conducted a meticulous review of that record. It determined that Judge Lord's conduct did "not evince the bad faith or de-

sign to prejudice the defendant's prospects for acquittal" sufficient to implicate double jeopardy concerns. That fact-bound judgment warrants no further review. See *Kennedy*, 456 U.S. at 675 (the decision whether a prosecutor intended to provoke a mistrial "calls for the court to make a finding of fact"); *Curtis*, 683 F.2d at 776-778; *Singleterry*, 683 F.2d at 125.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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